Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

LEISURE TIME ENTERTAINMENT, INC.,

Petitioner,

v.

CAL VISTA INTERNATIONAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In determining a claim of lost profits arising from a breach of contract for the distribution of more than 250 films, should the measure of damages be based upon the plaintiff's *own* documented sales history — before and after the breach — or by *estimating* damages based upon another company's sales records for different films?

Was it unreasonable and improper to grant more than one million dollars in attorneys' fees for services upon which the Respondent did not prevail, including three appeals in which its judgment was reversed?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Leisure Time Entertainment, Inc. has no parent company or subsidiaries, and there are no publicly held companies that own 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING CERTIORARI	10
I. THE NINTH CIRCUIT'S UNPRECEDENTED RULING, WHICH AUTHORIZES A DAMAGES CALCULATION FOR LOST PROFITS TO BE ESTIMATED THROUGH ANOTHER COMPANY'S SALES HISTORY RATHER THAN THE PLAINTIFF'S OWN EXPERIENCES, CONFLICTS WITH RULINGS OF THIS COURT, OTHER CIRCUIT AND STATE COURTS, AS WELL AS THE RECOMMENDATIONS OF LEGAL EXPERTS	10

Determination of an Existing Business's Lost Profits Requires Comparison of the Company's Profits Before and After the Breach of Contract..... 13

Let the Records Speak for Themselves..... 14

This Case Presents the Perfect Vehicle for Resolving the Recurring Questions Relating to Calculating Lost Profits..... 17

"Here There Be Dragons"..... 21

II. THE MANY ERRORS IN THE JUDGMENT ARE SUFFICIENT TO WARRANT REVIEW AND CORRECTION BY THIS COURT PURSUANT TO ITS SUPERVISORY POWER..... 22

CONCLUSION..... 25

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 24

Farmer v. Arabian Am. Oil Co.,
379 U.S. 227 (1964) 24

Fitzgerald v. Mountain States Tel. & Tel. Co.,
68 F.3d 1257 (10th Cir. 1995) 13

Flexitized, Inc. v. National Flexitized Corp.,
335 F.2d 774 (2d Cir. 1964) 14

Global Videos, Inc. v. Niekerk,
2006 WL 1737413 (9th Cir. June 22, 2006) 2

Kansas v. Colorado,
533 U.S. 1 (2001) 17

Leisure Time Entertainment, Inc. v. Cal Vista,
No. 94-56407, 79 F.3d 1153 (9th Cir. 1996) 1

Leisure Time Entertainment, Inc. v. Cal Vista,
No. 98-55294, 185 F.3d 867 (9th Cir. 1999) 1

Leisure Time Entertainment, Inc. v. Cal Vista,
No. 00-57005, 35 Fed. Appx. 565
(9th Cir. 2002) 2

Magna Weld Sales Co., Inc. v. Magna Alloys & Research Pty Ltd.,
545 F.2d 668 (9th Cir. 1976) 13

McBrayer v. Teckla, Inc.,
496 F.2d 122 (5th Cir. 1974) 14

McClaran v. Plastic Industries, Inc.,
97 F.3d 347 (9th Cir. 1996) 13

Palmer v. Connecticut Ry. & Lighting Co.,
311 U.S. 544 (1941) 11, 14, 20

Putnam v. Lower,
236 F.2d 561 (9th Cir. 1956) 11

Standard Machinery Co. v. Duncan Shaw Corp.,
208 F.2d 61 (1st Cir. 1954) 14

United States v. Twin Falls,
806 F.2d 862 (9th Cir. 1986) 24

Wash Solutions, Inc. v. PDQ Mfg., Inc.,
395 F.3d 888 (8th Cir. 2005) 14

State Cases:

Bagley v. Smith,
6 Seld. 489, 19 How. Pr. 1
(Sup. Ct. N.Y. Co. 1853) 15

Clark v. Scott,
258 Va. 296, 520 S.E.2d 366 (1999) 15

Coonis v. Rogers,
429 S.W.2d 709 (Mo. 1968) 15

Grupe v. Glick,
26 Cal.2d 680, 160 P.2d 832 (Cal. 1945) 11

McDonald v. John P. Scripps Newspaper,
210 Cal. App. 3d 100, 257 Cal. Rptr. 473
(2d Dist. 1989) 16

Mine Creek Contractors, Inc. v. Grandstaff,
300 Ark. 516, 780 S.W.2d 543 (1989) 15

Waggoner Motors, Inc. v. Waverly Church of Christ,
159 S.W.3d 42 (Tenn. Ct. App. 2004) 15

Williams v. Phillip Morris USA,
340 Or. 35, 127 P.3d 1165 (2006), *cert. granted*,
74 U.S.L.W. 3572 (U.S. May 30, 2006) (No.
05-1256) 16

Statutes:

U.S. Const., amend. V 4

15 U.S.C. § 1121 3

17 U.S.C. § 101 3

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1338(a) 3

28 U.S.C. § 1367(a) 3

California Civil Code § 3300 4

California Civil Code § 3301 ..... 4, 16

California Civil Code § 3358 4

Miscellaneous:

22 Am. Jur. 2d Damages § 760 (2006) 15

25 *C.J.S. Damages* § 281 (2006) 15

Restatement (Second) of Contracts § 352 ..... 11, 15

Robert L. Stern & Eugene Gressman, *et al.*, *Supreme Court Practice* (BNA Books 8th ed. 2002) 12

OPINIONS AND ORDERS BELOW

Because of the importance of the issues, arising from a contract dispute relating to more than 250 motion pictures licensed for foreign distribution by Respondent Cal Vista International, Ltd. from Petitioner Leisure Time Entertainment, Inc., this case made the distant journey between the Central District of California and the Court of Appeals for the Ninth Circuit on no less than four separate occasions.

(1) During the *first appeal*, the Ninth Circuit reversed an award of summary judgment to Cal Vista, and remanded for further findings of fact. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 94-56407, 79 F.3d 1153 (9th Cir. 1996) (Table) (Browning, Wallace & Farris, JJ.) (App. 1-4).[1]

(2) On the *second appeal*, the Court of Appeals reversed Cal Vista's copyright infringement award based upon lack of jurisdiction, since any copyright infringements occurred outside the United States. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 98-55294, 185 F.3d 867 (9th Cir. 1999) (Table) (Kozinski, Fernandez & Shubb, JJ.) (App. 11-13). The court did, however, remand for a determination of damages under Cal Vista's breach of contract claim.

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[1] Numbers preceded by "App." refer to pages in the attached Appendix. Numbers preceded by "ER." refer to the Excerpts of Record filed in the Ninth Circuit during the most recent appeal. Numbers preceded by "RT." indicate pages of the transcript from the trials and proceedings in the district court. "SER." followed by numbers refers to the Respondent's Supplemental Excerpts of Record filed in the Ninth Circuit.

(3) On a *third appeal*, Judges Alex Kozinski, Ronald M. Gould and Charles R. Breyer found that Cal Vista had already received a "healthy return" on its investment. The panel further found that the district court abused its discretion in granting Cal Vista more than $5 million in lost profit damages based upon a failure of proof. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 00-57005, 35 Fed. Appx. 565 (9th Cir. 2002) (unpublished) (App. 43-50). On July 17, 2002, the court clarified that its memorandum disposition did not preclude retrial and recalculation of damages. 41 Fed. Appx. 925 (9th Cir. 2002) (unpublished) (App. 51-52).

(4) On the *fourth appeal*, a panel sustained the district court's damage award, which was estimated based on the profits of a different film distribution company, without ever considering Cal Vista's actual sales history. This speculation resulted in a 450% recovery on Cal Vista's investment. *Leisure Time Entertainment, Inc. v. Cal Vista*, No. 04-56690, unpublished but available on WESTLAW as *Global Videos, Inc. v. Niekerk*, 2006 WL 1737413 (9th Cir. June 22, 2006) (Reinhardt, Trott & Wardlaw, JJ.) (App. 93-96).

(5) On August 10, 2006, Leisure Time's timely Petition for Rehearing and Rehearing *en Banc* was denied (App. 97-98).

(6) Then, on August 29, 2006, the Ninth Circuit *granted* Leisure Time's motion to stay the issuance of the mandate pending the filing of a petition for certiorari (App. 99-100).

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on June 22, 2006. A timely Petition for Rehearing and Rehearing *en Banc* was denied on August 10, 2006. The 90-day period for filing this petition expires on November 8, 2006. *See* Supreme Court Rule 30.1.

The jurisdiction of this Court to review the Ninth Circuit's ruling is invoked under 28 U.S.C. § 1254(1). The district court's subject matter jurisdiction was originally based on 15 U.S.C. § 1121, 28 U.S.C. § 1338(a), and 17 U.S.C. § 101, *et seq*. However, on July 2, 1999, the Ninth Circuit found that the district court lacked jurisdiction under the Copyright Act. Thus, on remand, the district court exercised jurisdiction over the remaining state law contract claim pursuant to 28 U.S.C. § 1367(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Civil Code § 3300 provides, in pertinent part, that the measure of damages for a breach of contract is an amount "which will compensate the party aggrieved for all the detriment proximately caused" by the breach. Similarly, California Civil Code § 3301 states, in relevant part, that "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." And, California Civil Code § 3358 provides, in part, "no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall be deprived of "life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents recurring issues of national import relating to the proper method of calculating damages in actions for breach of contract.[2] Petitioner Leisure Time produces adult home videocassettes sold throughout the world and specializes in the production of "compilation" films.[3] These compilations generally include scenes from Leisure Time's own features, as well as films purchased from other companies. Respondent Cal Vista distributes adult motion pictures in markets outside the United States.

The central sequence of events that frame the predominant issue in this case began back in 1988, and continued over a period of five years. Leisure Time produced 252 adult films, which it then licensed to Cal Vista for distribution overseas. Each individual licensing agreement usually covered a group of films that were recently created.[4] Cal Vista then entered into exclusive agreements with distributing companies in specific foreign territories for

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[2] According to statistics maintained by the Administrative Office of the United States Courts, *28,020 contract actions* were filed in the United States District Courts in 2005. *See www.uscourts.gov/judicialfactsfigures/Table404.pdf.*

[3] Compilations are full-length productions that are usually comprised of 48 discrete scenes excerpted from a vast database of features relating to a common theme. A compilation has no plot or storyline, and exists as nothing more than a collection of scenes.

[4] Cal Vista only paid between $1,500 and $2,500 per film, for a total of approximately $600,000 (A. 49).

set periods of time. Furthermore, it required licensees to pay a fixed fee, in advance, for seven years.[5] Cal Vista maintained separate sales records for each film that it re-licensed (ER. 780.30-780.281).

Leisure Time specifically retained all rights to its features in the United States and believed that it also had the right to make compilations from the features that it licensed to Cal Vista. As a consequence, in the middle of 1990 — *after Cal Vista had already distributed more than half of the features* — Leisure Time began distributing compilations abroad that, in some cases, included scenes from the 252 features (App. 45).

Cal Vista eventually sued Leisure Time in the Central District of California for copyright infringement and breach of contract.[6] Unable to show that its profits actually declined because of the circulation of compilations, Cal Vista, instead, endeavored to establish a loss of profits based upon another company's profits from its distribution of entirely different feature films.

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[5] Because Cal Vista got its money up front, its profits remained the same regardless of whether or not a particular feature was profitable in the licensed territory (App. 45).

[6] Leisure Time initially commenced a copyright action after Cal Vista made its own compilations exclusively from Leisure Time's features. On August 10, 1994, the district court (Pfaelzer, J.) granted Cal Vista's motion for summary judgment, which the Court of Appeals vacated (App. 2). Following the remand, six years after the distribution of compilations, and two years after the case was initiated, Cal Vista decided to counterclaim, urging, for the first time, that Leisure Time's compilations interfered with its profits from licensing the features.

Therefore, rather than consider Cal Vista's own sales history — detailing its profits before and after the breach — Cal Vista relied exclusively on the testimony of David Kravis, of Coastline Film, Inc., who claimed that the 252 features were comparable to 23 films that he hand-selected from his own vast library of adult features (App. 44).[7]

Mr. Kravis was permitted to speculate that the features should have earned, collectively, $6,300,000, even though Cal Vista's own records reveal that the features it actually licensed before the breach earned considerably less. The district court (Pfaelzer, J.) adopted Mr. Kravis' *estimate* of damages and then reduced the amount by the total revenue Cal Vista earned from licensing the features to arrive at an award of $5,230,658 in damages (App. 31).

The Ninth Circuit vacated the judgment and stressed that there was insufficient evidence that Leisure Time's compilations were the proximate cause of any damages. The court also concluded that Cal Vista had already received a "healthy return" of $1,069,342 for its sales both before and after the breach (App. 49). Furthermore,

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[7] As a good friend of Cal Vista's principal, Mr. Kravis picked the 23 films from his collection of 400 to 500 features. John Stagliano, the most famous director of adult films, directed 13 of the features. Eleven films were ranked on charts of the Top 20 sellers or rentals (ER. 1183.15). The Kravis films had longer running times than those licensed by Cal Vista and cost, on average, *three times* more to make than the run-of-the-mill features produced by Leisure Time (App. 47). The 252 films enjoyed none of these special attributes.

the court stressed that David Kravis' opinion, that each feature would have generated $25,000 in revenue (regardless of the quality or nature of each film), was "unsupported by substantial evidence" (App. 44).

On remand, Cal Vista was forced to concede that its earnings on all the features that were licensed *before* the distribution of compilations in mid-1990 *could not have been affected* by the subsequent release of compilations (App. 67, 88). Therefore, Cal Vista's profits from those *129 features* provided the proper measure for calculating any damages that it sustained for the *123 features* that it received after Leisure Time's compilations entered the foreign markets.

Nevertheless, even though its entire sales ledger was in evidence, Cal Vista continued to rely on the sales record of the 23 Kravis films to establish its lost profits.[8] However, Kravis' films were produced by different studios, distributed by another production company with unique packaging and marketing schemes, were not always sold to the same distributors, and often went into different territories.

And, instead of comparing Cal Vista's profits from the 129 features licensed *before* the breach against its profits for the 123 features licensed *after* the breach, the district court (Snyder, J.) merely speculated, once again, what Cal Vista should have earned based on estimates relating to Kravis' profits from *his* 23 select films, which averaged $18,096 per film. As a consequence,

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[8] Cal Vista, whose principal has been in the business since *1968*, had already developed a considerable history through years of fixed-fee licensing agreements (RT. 6/24/04 at 112, 119).

the court awarded Cal Vista $1,703,867 in damages, plus prejudgment interest of approximately $720,000, as well as $1,334,882 in attorneys' fees (App. 92). This resulted in a total judgment of $3,758,750.

The Ninth Circuit affirmed the unprecedented judgment, which relied exclusively on a different company's experiences to estimate lost profits — rather than simply comparing the actual earnings of Cal Vista's features licensed *before* the release of compilations with the actual earnings of the films licensed *after* the circulation of compilations (App. 93-96). In fact, Cal Vista's sales were never considered at all!

The severe prejudice from this unconventional approach, which allows a district court to go outside the universe of the plaintiff's own sales experience and consider, instead, the profitability of a different company is manifest — especially where it involves the marketing of something as volatile and non-fungible as films. Significantly, a comparison of Cal Vista's actual sales history reveals that it received *more profits* in 1991 and 1992 — *after* the distribution of compilations — than it ever made in 1988, 1989 and 1990, *before* the offending compilations were distributed in mid-1990 (*see* RT. 7/20/00 at 83-85).[9]

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[9] Cal Vista only earned, on average, $5,530 per film in 1988 and $3,076 in 1989 from licensing the features *before* the breach (*see* ER. 780.30-780.33; RT. 7/20/00 at 83-85). Nevertheless, the court awarded Cal Vista $18,096 for every film licensed after the breach!

Fully recognizing the substantial and important issues presented by this case, the Ninth Circuit granted Leisure Time's motion to stay the issuance of the mandate pending the filing of a petition for certiorari (App. 99-100).[10]

REASONS FOR GRANTING CERTIORARI

I. THE NINTH CIRCUIT'S UNPRECEDENTED RULING, WHICH AUTHORIZES A DAMAGES CALCULATION FOR LOST PROFITS TO BE ESTIMATED THROUGH ANOTHER COMPANY'S SALES HISTORY RATHER THAN THE PLAINTIFF'S OWN EXPERIENCES, CONFLICTS WITH RULINGS OF THIS COURT, OTHER CIRCUIT AND STATE COURTS, AS WELL AS THE RECOMMENDATIONS OF LEGAL EXPERTS

The United States is the most litigious country in the world. Every year more than 250,000 civil cases are filed in the federal courts. And, most of those suits seek damages under some form of contract right. Damage awards are now spiraling out of control, which is a matter of considerable concern to the courts.

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[10] A party "may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must . . . show that the certiorari petition would present a substantial question and that there is good cause for a stay." F.R.A.P. 41(d)(2)(A).

Nevertheless, the Ninth Circuit's unprecedented rule, affirming that damages for lost profits based on a breach of contract can be estimated by projecting hypothetical profits, rather than utilizing the plaintiff's own books and records, is destined to authorize even greater speculative awards. However, this dangerous approach is in direct conflict with this Court's decision in *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544 (1941). In addition, it conflicts with rulings of other circuit and state courts that have addressed this issue. Thus, the scale of this issue can be measured by its impact on most litigation conducted throughout the entire country! All this lends enormous force to our greatest fears.

Concern over this recurring issue is also bound to be amplified because here the panel's opinion is in serious conflict with Ninth Circuit precedent as well as the Supreme Court of California, which acknowledge that the most accurate and reliable measure of establishing a company's lost profits is by examining its own sales history. *See, e.g.*, *Putnam v. Lower*, 236 F.2d 561, 571-72 (9th Cir. 1956); *Grupe v. Glick*, 26 Cal.2d 680, 692, 160 P.2d 832, 840 (Cal. 1945); *Restatement (Second) of Contracts* § 352.[11]

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[11] In *Putnam*, the court indicated that prospective profits calculated by considering the company's past profits as a "yardstick of prior profits" provides "definite knowledge of the parties' past productivity." *Id.*

Of course, the "existence of an intracircuit conflict" is sufficient to warrant review by this Court.[12] This is particularly so where that conflict arises out of the colossus of circuit courts. Moreover, if the decision of the Ninth Circuit is "one to which state laws and decisions are applicable, a conflict with, or a refusal to follow, a decision rendered by the highest court of the state may provide a ground for review of the court of appeals decision."[13]

The need for this Court's resolution of these important issues is heightened because, in the sensitive area of damage calculations, no judge should be permitted to substitute pure estimates based on the earnings of another company in place of the plaintiff's actual profits. In addition, because of the conflicting case law that has developed and the ever-mounting awards of damages in contract litigation, it is evident that this Court should give some definitive guidance as to what is the proper method of arriving at damages in such claims.

The common anxieties for litigants attached to a question of this sheer magnitude, involving as it does an aberrant and speculative method of calculating damages, warrants review by this Court. Furthermore, the corrosive force of this misuse of a methodology of computing lost profits is bound to have ramifications far beyond the confines of this case.

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[12] *See* Robert L. Stern & Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002).

[13] Stern, *Supreme Court Practice* § 4.10.

Determination of an Existing Business's Lost Profits Requires Comparison of the Company's Profits Before and After the Breach of Contract

Where an existing business claims to have sustained damages in the midst of its operation, the truest measure of any lost profits is determined by comparing the company's profits *before* the breach with those earned *after* the breach. This practical approach stems from the fundamental principle that the past performance of a business provides the very best means to establish any damages. This is, of course, because the most direct measure of an established company's lost profits is found in its own sales history and tangible records.

Damages for lost profits have their "foundation in the past experience of the concern said to have suffered the loss."[14] Moreover, "damages for lost profits must be for profits actually lost, and those must be proven with reasonable certainty."[15] Therefore, to avoid improper speculation in damage awards, courts should not shut their eyes to the powerful light that the business's past experience casts on any alleged loss of future profits.

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[14] *See Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995).

[15] *Magna Weld Sales Co., Inc. v. Magna Alloys & Research Pty. Ltd.*, 545 F.2d 668, 672 (9th Cir. 1976); *McClaran v. Plastic Industries, Inc.*, 97 F.3d 347, 355 (9th Cir. 1996) (an "award of lost profits for an existing business is not speculative if the business's track record supplied a basis for the award").

Let the Records Speak for Themselves

On January 6, 1941, this Court issued a decision that stands guard over this whole body of law governing damage awards. In *Palmer v. Connecticut Ry. & Lighting Co.*, the Court underscored the extremely high "probative value of past experience" in assessing damages. 311 U.S. at 560. The Court also stressed that "[n]othing is more indicative" of the value of an existing entity than past earnings. *Id.* As a consequence, the Court concluded that proof of future profits by the evidence of past profits, in an established business, provides a reasonable basis for such a conclusion. 311 U.S. at 559. This rule should be reaffirmed in the face of the growing division.

Prior to the decision in this case, most circuit courts agreed that the best evidence of lost profits involves comparing the experience of the injured party's own business before and after the wrongdoing.[16] Similarly,

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[16] *See, e.g., Standard Machinery Co. v. Duncan Shaw Corp.*, 208 F.2d 61, 63 (1st Cir. 1954) ("[c]ertainly no authority need be cited for the . . . proposition that evidence of past profits from an established business provides a reasonable basis for estimating future profits from the business"); *Flexitized, Inc. v. National Flexitized Corp.*, 335 F.2d 774, 779 (2d Cir. 1964) (plaintiffs' evidence of their sales before and after the breach was "clearly acceptable proof tending to show the amount of lost profits"); *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 127 (5th Cir. 1974) ("the profits the business has been making at a point not too remote prior to the breach are competent evidence of profits to be anticipated at a point not too remote after the breach"); *Wash Solutions, Inc. v. PDQ Mfg., Inc.*, 395 F.3d 888, 893 (8th Cir. 2005) ("expected future profits may be extrapolated with reasonable certainty from historical evidence of the income and expenses of the business prior to the damaging event").

the majority of state courts recognize that any assessment of lost profits requires *some* analysis of the company's profitability and history.[17]

Furthermore, the Ninth Circuit's recent approach conflicts with leading legal scholars and commentators, who stress that claims for damages resulting from a breached contract should be calculated based on evidence of actual losses reflected in the company's own books — rather than looking out to the records of an unrelated company to estimate damages.[18] Consideration of a different

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[17] *See, e.g., Bagley v. Smith*, 6 Seld. 489, 19 How. Pr. 1 (Sup. Ct. N.Y. Co. 1853) ("no man would undertake to form an opinion as to the prospective profits of a business without, in the first place, informing himself as to its past profits"); *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968) ("proof of the income and expenses of the business, for a reasonable time anterior to its interruption, with a consequent establishing of the net profits during the previous period, is indispensable"); *Clark v. Scott*, 258 Va. 296, 302, 520 S.E.2d 366, 370 (1999) (the "prior and subsequent record of the business's profits may be used to permit an intelligent and probable estimate of damages"); *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 523, 780 S.W.2d 543, 546 (1989); *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 59 (Tenn. Ct. App. 2004). This list is illustrative only and by no means exhaustive.

[18] *See Restatement (Second) of Contracts* § 352 cmt. b (1981) ("[e]vidence of past performance will form the basis for a reasonable prediction as to the future"); 25 *C.J.S. Damages* § 281 (2006) ("evidence of past profits may be highly relevant"); 22 *Am. Jur. 2d Damages* § 760 (2006) ("[w]here a regularly established business is injured, the average profits that the business is then earning and has earned are competent proof as to the loss of profits").

company's experiences inevitably results in the very type of speculation and surmise that creates uncertainty and allows for excessive awards, such as this.[19]

Nevertheless, in affirming the district court's decision, the Ninth Circuit has now endorsed a rule whereby lost profits of an ongoing business may be estimated based solely upon the profits of an unrelated company with significantly different operations, rather than the history and profitability of the plaintiff! If such a radical rule, by the *largest circuit court in the nation*, is left uncorrected, it is destined to affect thousands of other cases in this exploding age of litigation.[20] The sheer scale of this issue warrants review by this Court.

Underscoring the importance of damage issues, this Court has recently granted certiorari in a number of cases that present similarly compelling questions. *See, e.g., Williams v. Phillip Morris USA*, 340 Or. 35, 127 P.3d 1165 (2006), *cert. granted*, 74 U.S.L.W. 3572 (U.S. May 30, 2006) (No. 05-1256) (review of determination of punitive damages). And, because of the critical role the calculation of damages plays in virtually all civil proceedings — both state and federal — this Court has

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[19] Plaintiffs have always been required to establish lost profits with reasonable certainty. *Palmer*, 311 U.S. at 558. Moreover, California Civil Code § 3301, which governs these proceedings and is typical of statutes across the nation, provides that "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." *See also McDonald v. John P. Scripps Newspaper*, 210 Cal. App. 3d 100, 104, 257 Cal. Rptr. 473 (2d Dist. 1989) (damages that "are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery").

[20] The panel's decision is available for public review through WESTLAW.

always expressed acute interest in cases that address this issue. Recently, the Court's interest has intensified. *See, e.g., Kansas v. Colorado*, 533 U.S. 1 (2001) (consideration of whether the method of calculating damages was proper relating to the difference in crop yields resulting from lack of water flow).

This Case Presents the Perfect Vehicle for Resolving the Recurring Questions Relating to Calculating Lost Profits

This case is uniquely suited to review the recurring issues relating to the proper method for calculating lost profits. Here, nearly half (129) of the 252 features were wholly unaffected by the breach because they were already locked into fixed-fee licensing agreements before any compilations were ever distributed abroad. As a consequence, Cal Vista's records relating to the profitability of those features provide the most accurate and reliable measure of what Cal Vista could expect to earn from the other half of its films, which were marketed in the very same manner to the same distributors.

What is so telling about Cal Vista's own records is that they detail that, on average, it earned the same or even more money from licensing the features *after* the distribution of compilations than it did before![21] The

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[21] A comparison of Cal Vista's actual sales history before the compilations were distributed with its subsequent sales history indicates that Cal Vista received more profits in 1991 and 1992 — after the distribution of compilations — than it ever made in 1988, 1989 and 1990, before any distribution of the offending compilations (*see* RT. 7/20/00 at 83-85). For example, in 1988 Cal Vista earned, on average, $5,530 per title. It averaged $3,076 in 1989; $3,386 in 1990; $5,481 in 1991; and $3,141 in 1992. *Id.* Thus, Cal Vista's profits *increased* — and certainly were not "lost" — with the distribution of compilations.

following chart makes glaringly obvious that Cal Vista truly sustained no damages at all and continued to license the features for the very same profits after compilations were distributed in mid-1990. These hard facts deserve heightened attention.

Cal Vista's average sales per film for 1988 and 1989 (before compilations)	Cal Vista's average sales per film for 1991 and 1992 (after compilations)	The district court's estimated award per film
$4,303	$4,311	$18,096

Despite this compelling proof, rather than give any consideration to Cal Vista's prior profits from licensing the very same catalog of features to its own distributors in the same territories, the court instead looked to the profits of *23 premium films* produced by a completely different company that were often marketed to different distributors in different territories.[22]

[22] The panel indicates that the "district court's comparison of the revenue garnered by similar adult films, in order to determine how much money Cal Vista's films would have produced absent the compilations, was a 'reasonable basis of computation' " (App. 95). But, it is patently unreasonable to look to the profitability of 23 choice films and the operating history of another company when Cal Vista's own sales records do not support a claim that it sustained any loss of profits!

The severe prejudice from this unique approach, which allows a district court to go outside of the universe of the plaintiff's own sales experience and consider, instead, the profitability of a much more successful venture, is manifest in this case. The court presumed that Cal Vista's features licensed after mid-1990, from the very same catalog, should have earned, on average, $18,096 as well. But, this is approximately *six times* what Cal Vista's features actually made in 1989 — *before* any compilations were distributed.

Faced with the dilemma that not a shred of evidence existed in the record to support this dramatic inflation of profits, Cal Vista was forced to resort to a speculative theory of damages. This error is especially acute where the panel concedes that the "question of causation was a close call" (App. 94).

The panel's decision authorizes plaintiffs to rely on estimated damages rather than their own experiences. But, where the profits of selected companies are used for comparison, this will be accompanied by all of the fallibilities associated with such a strategy. Therefore, this unprecedented decision is destined to engender further confusion in this important area of the law — particularly in a circuit where the distribution of films is most prevalent. And, courts will be unsure of how to cope with the consequences of this rule of damages.

Litigants who must endure excessive damage awards, based on a speculative theory of damages, suffer grievous wrongs and should be entitled to have this injustice corrected. This is especially true where, as here, such a lopsided award of theoretical damages has been imposed. The failure to utilize the logical and standard way of calculating lost profits — which considers the plaintiff's actual profits — cannot help but erode our confidence in the American system of justice.

The Ninth Circuit's new rule will open the door to all sorts of novel ways to estimate damages that are based on theory — not fact. And, these theories will only be limited by the ingenuity of an advocate's imagination. Counsel must now anticipate a variety of theoretical approaches to damages, which are highly speculative or based upon the conjecture of experts.

Defense attorneys will now have to investigate every conceivable form of recovery rather than one based on profits actually reflected in the plaintiff's books. Of course, the books and records of a company provide documentation that gives a sense of certainty and reliability to an award of damages that hypothesis does not. As recognized by Carl Sandburg, the "best witness is a written paper." Certainly, the more reasonable rule adopted by this Court in *Palmer*, more than 60 years ago, should be reinforced by this Court.[23]

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[23] The virtue of the singular and solitary "books and records" rule of damages, which always looks first to the plaintiff's records before reaching outside the record to consider other sources, is that it is finite. A defendant's liability for a breach of contract can be ascertained easily and fairly. It also only subjects a party to a damage claim that is documented by hard facts of actual loss — rather than speculated losses.

Now is the time for this Court to resolve this disruptive conflict of authority. The basic unfairness of the Ninth Circuit's excessive damage award adds to the appropriateness of granting certiorari in this case. The Court of Appeals' exceptional stance requires this Court to step in and settle this issue once and for all.

"Here There Be Dragons"

Ancient mapmakers, when they reached the end of the earth, as it was then known, wrote "Here There Be Dragons." This warning expressed a natural fear of the unexplored. For, in medieval times, the unfamiliar always instilled fear. Under the rule of the Ninth Circuit, there is no way to tell what lies beyond a claim for damages in an ordinary breach of contract suit if it is not based upon the plaintiff's books and records that reveal its actual profits and losses.

In a metaphorical sense, today, when defendants are forced to navigate through the turbulent seas of litigation, the dragons that lie deep in the darkness of pure hypothesis and speculation, embodied in the Ninth Circuit's rule, are very real indeed. For, as here, the dragons of excess — resulting in claimed lost profits of 450% for Cal Vista's investment — defy all logic and rationality. These damages ran off the edge of the map and subjected Leisure Time to the dark ambiguity that the ancient mapmakers feared so greatly.

Without resolution, this issue will continue to fester and generate conflicts across the nation. Since the issues have been so clearly drawn by the stark facts of this case, this matter is now ideally situated for final review by this Court.

II. THE MANY ERRORS IN THE JUDGMENT ARE SUFFICIENT TO WARRANT REVIEW AND CORRECTION BY THIS COURT PURSUANT TO ITS SUPERVISORY POWER

Certiorari review, under the Court's supervisory powers, is also warranted to avoid a gross miscarriage of justice because the Ninth Circuit's decision overlooked critical errors by the district court that are bound to have wide ranging consequences.[24] In addition to the fatally flawed speculation concerning lost profits, the court awarded Cal Vista $1,703,867, even though it already received a "healthy return" of $1,069,342 [a return of nearly 100%] from the low-cost feature films that it acquired for only $600,000.[25]

Second, since Cal Vista made a calculated business decision to license its features to foreign distributors for a flat fee, paid in advance, its profits were fixed and could not be affected by competing compilations in the licensed territories (App. 45). The primacy of this fact applies to all of Cal Vista's features — not just the 129 features that it received prior to mid-1990 before the distribution of compilations commenced. Nevertheless, the district court's judgment erroneously assumed that

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[24] Supreme Court Rule 10(a) provides, in part, that certiorari is warranted where the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court." Of course, the Court can accept cases for review "for no apparent reason other than error in the lower court decision." Stern, *Supreme Court Practice* § 4.17.

[25] Cal Vista obtained this extravagant and unjustified award even though the proof showed that it received all of the revenue that it could expect from these "bottom of the barrel, low quality, filler product" (SER. 149).

Cal Vista sustained damages for *all* features that it received after mid-1990 regardless of when and where compilations were distributed that may have contained scenes from those features (App. 73).[26]

Adopting the concession of Cal Vista's own expert, Judges Kozinski, Gould and Breyer previously held, in this case, that proximate cause for lost profits is established by proof that the illegal compilations were distributed in the same market, and at the same time, as the feature that is claimed to have been adversely affected (App. 47-48). Thus, Cal Vista's failure to prove that any compilation, containing scenes from a particular feature, was ever distributed in the same territory and at the same time as that specific feature, doomed its case for damages.

Finally, the unreasonable judgment should be reviewed where Cal Vista was awarded $1,334,882 in attorneys' fees even though a significant portion of its fees related to claims upon which it clearly did not prevail — including *three appeals* to the Ninth Circuit where its judgment was either reversed or vacated by the court! (App. 5, 13, 50).

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[26] It takes time to assemble and produce a compilation. And, significantly, the initial production and distribution of the compilations did not occur until two and a half years after Cal Vista received the first set of features in 1988. In many cases there was a one to two year time lapse between the date a compilation was released in the United States and when it was distributed abroad (RT. 7/20/00 at 72).

Moreover, Cal Vista obtained fees for wholly unsuccessful applications, such as its attempt to justify nearly $100,000 in expert witness costs based on authorities that this Court expressly reversed (ER. 1032.2-1032.3).[27] Counsel for Leisure Time was forced to research these issues and defend against erroneous claims. Nevertheless, Cal Vista was awarded a shocking wholesale award of more than one million dollars in attorneys' fees.

Our federal courts stand as bastions of fairness and justice. However, decisions, such as this, call radically into question our deepest assumptions regarding the proper functioning of the federal judiciary. As a consequence, the supervision by this Court is desperately needed in this case to ensure that right is done.

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[27] For example, counsel for Cal Vista cited to *United States v. Twin Falls*, 806 F.2d 862 (9th Cir. 1986) and *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227 (1964), to support its claim for expert witness costs, even though those authorities were overruled and expressly disapproved of by this Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

CONCLUSION

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the Ninth Circuit's order in this case.

November 8, 2006

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 14 1996
CATHY A. CATTERSON, CLERK
US COURT OF APPEALS

LEISURE TIME ENTERTAINMENT, INC. a/k/a "LTE", Plaintiff-Appellant, v. CAL VISTA, Defendant-Appellee.	C.A. No. 94-56407 D.C. No. CV-94-02873-MRP MEMORANDUM*

Appeal from the United States District Court
Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted, March 7, 1996
Pasadena, California

Before: BROWNING, WALLACE, and FARRIS, Circuit Judges.

Leisure Time and Cal Vista entered into a series of contracts drafted by Cal Vista in which Leisure Time transferred "the exclusive right, under copyright, to exhibit, to distribute, sell and otherwise deal in and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as provided by 9th Cir. R. 36-3.

exploit" 257 adult films outside the United States and Canada. The contracts provide that California law governs disputes. This suit arises from Cal Vista's use of the Leisure Time originals to prepare derivative works. The district court rejected Leisure Time's contention that this right had not been transferred, and it granted Cal Vista's motion for summary judgment. We reverse.

If a contract is ambiguous, summary judgment is "improper" because "differing views of the intent of parties will raise genuine issues of material fact." *U.S. v. Sacramento Municipal Utility Dist.*, 652 F.2d 1341, 1344 (9th Cir. 1981). Whether a copyright transfer is ambiguous is a question of law determined by application of general principles of contract interpretation. *See Beck Park Apts. v. U.S. Dept. of Housing,* 695 F.2d 366, 369 (9th Cir. 1982); *Nimmer on Copyright* § 10.08, 10-71 (1995).

Courts interpret contracts to give effect to the mutual intent of the parties. *See* Cal. Civ. Code § 1641; *Sunset Sec. Co. v. Coward-McCann, Inc.*, 306 P.2d 777, 779 (Cal. 1957). "'[T]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the contract is reasonably susceptible.'" *Barris Indus. v. World Vision Enter.*, 875 F.2d 1446, 1450 (9th Cir. 1989) (citing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage and Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968)). "Even if a contract appears to be absolutely clear on its face, the court is required to engage in a preliminary consideration of extrinsic evidence to see whether it creates an ambiguity." *Id.* The court may consider extrinsic evidence of post-contract acts if

those acts were "positive and deliberate and done in attempted compliance with the terms of the agreement." *Id.* But extrinsic evidence "does not foreclose summary judgment" if it "is insufficient to render the contract susceptible to the non-movant's proffered interpretation." *Id.*

The 1976 Copyright Act provides that the owner of a copyrighted work has the rights:

> (1) to reproduce the copyrighted work in copies . . . ;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership . . . ;
>
> (4) in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of [dramatic pictorial works], including the individual images from motion pictures or other audiovisual works, to display the copyrighted work publicly.

17 U.S.C. § 106. These rights are divisible. They may be "owned separately" and may be "transferred in whole or in part by any means of conveyance." 17 U.S.C. §§ 201(d)(1), 201(d)(2). Generally, if the transferee prepared the contract, the owner of the copyrighted work reserves those rights not expressly granted. *See Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945, 949 (9th Cir. 1954) ("The clearest language is necessary to divest the author of the fruits of his labor."); *Nimmer* § 10.08, 10-72.

We hold that the contracts do not contain an unambiguous transfer of the right to prepare derivative works. A fair reading of the transfer clause suggests that the right "to exhibit" conveys the right "to perform" under 17 U.S.C. § 106(4), and that the right "to distribute, sell and otherwise deal in" conveys the right "to distribute . . . by sale" under 17 U.S.C. § 106(3). "[T]o . . . exploit" is the only language that could have conveyed the right "to prepare derivative works." Webster's defines "exploit" to mean "to turn to economic account." Arguably, Cal Vista's interpretation is plausible; one way to turn films to economic account is to prepare and distribute derivative works. But Leisure Time's interpretation is also plausible. The word "and" connects "to distribute, sell and otherwise deal in" with "exploit." If "exploit" were intended to convey the divisible right to prepare derivative works, Cal Vista would have put the word "to" in front of it, just as the divisible right "to exhibit" was separated from the divisible right "to distribute. . . ." The fact that Cal Vista did not do so suggests that it intended "exploit" to have a meaning similar to the words in the preceding string (i.e., "distribute", "sell", and "deal in").

The district court made several errors in concluding that there was no ambiguity. First, it failed to explain the extrinsic evidence in the record supporting Leisure Time's interpretation. Cal Vista waited six years before preparing its first compilation and contemplated forming a joint corporation with Leisure Time for the purpose of preparing and distributing compilation films. The long delay and the contemplation of an agreement to share profits are difficult to reconcile with the proposition that Cal Vista believed it had acquired the exclusive right to prepare compilations and distribute them outside the United States and Canada.

Second, the district court erred in holding that if a transfer of rights is broadly worded, the transferor has the burden of specifying the rights retained. All of the cases it cited involve the 1909 Copyright Act, under which the rights to a copyrighted work were indivisible, *see Nimmer* § 10.01, 10-5, or stand for the separate rule of construction that the transferor bears the burden of specifying those mediums in which the copyrighted work may not be used. *See, e.g., Platinum Record Co., Inc. v. Lucasfilm, Ltd.*, 566 F.Supp. 226, 227 (D.N.J. 1983) (transferee who acquires the right to "exploit" a film "*by any means or methods now or hereafter known*" may sell video cassettes and discs); *Nimmer* § 10.08, 10-72 n.7 (courts use "specialized rules of construction" for determining "the medium to which an assignment . . . applies").

Third, the district court erred in finding that if Cal Vista did not have the right to prepare compilations and distribute them outside the United States and Canada, then neither party had the right. Although it is reasonable to construe copyright contracts so that no rights are lost, neither the district court nor Cal Vista have cited authority for the implied rule that the owner of a copyrighted work who transfers the rights to distribute the work in a particular region necessarily loses the right to prepare and distribute derivative works in that region.

Because the contracts are ambiguous, summary judgment was inappropriate.

REVERSED and REMANDED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-55294
CT/AG#: CV-94-02873-MRP

LODGED
CLERK, U.S. DISTRICT COURT
SEP -8 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
SEP 27 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
SEP 30 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

LEISURE TIME ENTERTAINMENT, INC., aka Seal 1

Plaintiff-counter-defendant - Appellant

and

MARK CARRIERE, an individual

Cross-defendant - Appellant

and

GLOBAL VIDEOS, INC.;

Plaintiff - Appellant

v.

CAL VISTA, aka Seal A; SIDNEY NIEKERK, aka Seal B; LLOYD ROBINSON, aka Seal C

Defendant-counter-claimant-cross-claimants - Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REMANDED IN PART, VACATED IN PART. NO COSTS.

Filed and entered July 2, 1999

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Clerk of Court
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Deputy Clerk

SEP 30 1999

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL -2 1999
CATHY A. CATTERSON
CLERK, US COURT OF APPEALS

LEISURE TIME ENTERTAINMENT, INC., aka Seal 1,

Plaintiff-counter-defendant-Appellant,

and

MARK CARRIERE, an individual,

Cross-defendant-Appellant,

and

GLOBAL VIDEOS, INC.,

Plaintiff-Appellant,

v.

CAL VISTA, aka Seal A; SIDNEY NIEKERK, aka Seal B; LLOYD ROBINSON, aka Seal C,

Defendant-counter-claimant-cross-claimants-Appellees.

No. 98-55294

D.C. No. CV-94-02873-MRP

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted June 10, 1999
Pasadena, California

Before: **KOZINSKI** and **FERNANDEZ**, Circuit Judges, and **SHUBB,**[**] District Judge.

1. For the Copyright Act to apply, "at least one alleged infringement must be completed entirely within the United States." *Allercom Pay Television, Ltd.* v. *General Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995). This domestic act must be one that "would have been actionable even if the subsequent foreign distribution that stemmed from that use never took place." *Subafilms Ltd.* v. *M.M.-Pathe Communications Co.*, 24 F.3d 1088, 1094 (9th Cir. 1994) (en banc). As appellants had the right to make and distribute copies of the works in the United States, no infringing act was completed prior to the distribution of those works overseas. The district court therefore lacked jurisdiction to award statutory damages and attorneys' fees under 17 U.S.C. §§ 504(c), 505 (1994 & Supp. 1999).

2. The district court found that the parties had used the disputed contractual language in other transactions, where they intended it to convey the entire copyright. The court also found appellants' attempts to distinguish these other transactions unpersuasive. These findings are not clearly erroneous.

[**] The Honorable William B. Shubb, Chief United States District Judge for the Eastern District of California, sitting by designation.

3. The district court did not abuse its discretion in denying appellants a continuance when their witnesses failed to appear for trial. In any event, appellants had an opportunity to present all their evidence during the trial.

Accordingly we **AFFIRM** the district court's findings of fact and conclusions of law with regard to the breach of contract claim and **REMAND** for a determination of contract damages. We **VACATE** the judgment with respect to the copyright claims. No costs.

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OCT 20 2000
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FILED
OCT 19 2000
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEISURE TIME ENTERTAINMENT, INC., Plaintiff, vs. CAL VISTA, SIDNEY NIEKERK, LLOYD ROBINSON and DOES 1 through 50, Defendants.	Case No. CV-94-2873 MRP
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DAMAGES FOR BREACH OF CONTRACT

✓ Docketed
✓ Copies/NTC Sent
__ JS-5 / JS-6
__ JS-2 / JS-3
✓ CLSD

This case was commenced by complaint filed by Plaintiff Leisure Time Entertainment, Inc. ("LTE") in May, 1994. After both parties filed motions for summary judgment, Defendant Cal Vista International, Ltd. ("CVI") filed an answer and various counterclaims and cross-claims against LTE and related parties.

On January 15, 1997, on the motion of Plaintiff, the Court ordered that the trial in this case be bifurcated: that the liability phase be heard first, and thereafter, in the event liability was determined, the damage phase would be heard. On January 30, 1997, the liability phase of this action was tried to the Court without a jury.

After hearing four days of testimony and argument, and after reviewing all documents and other exhibits introduced into evidence, the Court found that between 1988 and 1993, CVI and LTE entered into 39 separate

Purchase Agreements relating to 257 feature films (the "Features"). The Court found, *inter alia*, that by virtue of the Purchase Agreements, CVI acquired from LTE all rights, including all rights under copyright, in the Features for the territory (the "Foreign Territory") outside the United States (or, in some cases, the United States and Canada).

The Court determined that LTE willfully infringed 252 of those Features by distributing compilations containing excerpts from the Features (the "Illegal Compilations") in CVI's exclusive Foreign Territory and further found that LTE's distribution of the Illegal Compilations in CVI's Foreign Territory was a breach of CVI's exclusive rights under the Purchase Agreements.

The Court's Findings of Fact and Conclusions of Law resulting from that liability phase of the trial were entered on April 24, 1997 (the "Court's April Findings").

On July 28, 1997, at a status conference before the Court, CVI elected to request statutory damages pursuant to §504(c) of the Copyright Act. To avoid a duplicative recovery on alternative theories, CVI waived its right to a trial on the issue of actual damages. LTE requested that the Court grant an opportunity to both parties to present evidence as to actual damages suffered by CVI, actual profits earned by LTE, and arguments and authorities as to an appropriate award of statutory damages. The Court granted LTE's request and by Minute Order dated July 31, 1997, instructed counsel to submit briefs and evidence in the form of declarations with respect to all legal and factual issues relating to the award of statutory damages to CVI in this case.

After consideration of all of the briefs, declarations and other evidence submitted by the parties, the Court awarded CVI statutory damages against LTE in the amount of $5,040,000.

LTE appealed the District Court's judgment and on July 2, 1999, the Ninth Circuit Court of Appeals reversed the District Court's award of statutory damages for copyright infringement on jurisdictional grounds. The Ninth Circuit affirmed the District Court's Findings and Conclusions regarding LTE's breaches of the Purchase Agreements and remanded the case to the District Court for a trial to determine CVI's damages for LTE's breaches of the Purchase Agreements.

Pursuant to the direction of the Ninth Circuit, the issue of damages in this action was tried to the Court without a jury between July 13 and July 25, 2000. The Court has read and considered all of the testimony and evidence presented by the parties, the pleadings and papers on file, and the arguments of counsel. The Court has found that Defendants/Counter-claimants CVI have met their burden of showing certainty of damages under California law and has further found that CVI is entitled to damages from LTE for LTE's breaches of the Purchase Agreements in the amount of $5,230,658.

Additionally, the Court has found for the Defendants/ Counter-claimants CVI on their request for attorneys' fees, but chooses not to award pre-judgment interest pursuant to its discretion under Cal. Civil Code § 3287(b) (West 1997).

The Court hereby makes and enters the following Findings of Fact and Conclusions of Law:

I.

FINDINGS OF FACT

1. Plaintiff and Counter-defendant Leisure Time Entertainment, Inc. ("LTE") is a corporation organized and existing under the laws of the State of Indiana, qualified to do business, and having its principal place of business, in the Central District of California. LTE includes the following affiliated companies and fictitious names under which it does or has done business: National Video, Nation-Wide Video Distributors, Leisure Time Communications, Video Exclusives, Mark Curtis Productions, Multi-Media, Infinity Video, Venus Video, Platinum Pictures, Ecstacy Video, Golden West Video, Canyon Video, Red Hot Video, Tux Video, Pirate Video, Boss Video, Rebel Video, Stallion Video, Keyhole Video, and Rawhide Video. (All of said companies, tradenames, dba's or corporate designations are herein referred to as "LTE".)

2. Plaintiff Global Videos, Inc. ("Global") is a corporation organized and existing under the laws of the State of Indiana, qualified to do business in the State of California, and having its principal place of business in the Central District of California. The parties stipulated that for purposes of this action, LTE is deemed to be responsible for the acts and omissions of Global and any gross revenue realized by Global from the sale or exploitation of infringing LTE Compilations is deemed to be gross revenue realized by LTE.

3. Defendant, counter-claimant and cross-claimant Cal Vista International, Ltd. (hereinafter "CVI") is a California corporation.

4. The LTE Parties are and at all relevant times were in the business of producing adult motion pictures for distribution throughout the world in the form of videocassette and other formats intended principally for private and non-theatrical viewing.

5. The CVI parties are and at all relevant times were in the business of licensing and distributing adult motion pictures outside the United States.

6. On or about February 24, 1988 and continuing through April, 1993, CVI and LTE (or its predecessors in interest including Video Exclusives), entered into a series of 39 Purchase Agreements relating to a total of 257 adult motion pictures (the "Features"). The first of the Purchase Agreements was entered into on or about February 24, 1988.

7. Each of the Foreign Purchase Agreements contain, in paragraph 3, the following language:

> [Leisure Time] hereby transfers, assigns and sells to [CVI], throughout the purchased Territory, the exclusive right, under copyright, to exhibit, to distribute, sell and otherwise deal in and exploit the Picture(s) and trailers thereof, in connection with [the Pictures identified in paragraph 1] in perpetuity, which shall include but not be limited to the full period of any copyright in the Picture(s) and all renewals, extension and continuations of any such copyright.

8. The "Purchased Territory" was defined in paragraph 2 of the Foreign Purchase Agreements as the entire world, excluding the United States and Canada. As to 14 of the Features, the 'Purchased Territory' was defined as the world, excluding the United States.

9. The term of each Purchase Agreement and of the rights granted to CVI thereunder, is in perpetuity.

10. Each Purchase Agreement provides that it shall be construed and interpreted according to California Law.

11. Each of the Purchase Agreements contains the following provision:

> "Should any litigation be commenced between the parties to this contract, arising out of this Agreement, the party prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for his attorney's fees in such litigation."

12. Throughout the relationship between LTE and CVI, it was CVI's practice to license all or a portion of CVI's rights in the Features exclusively to a network of distributors in specific countries throughout the Foreign Territory for a limited period of time, after which the licensed rights would revert to CVI. In some cases, CVI licensed to its distributors the right to use excerpts from the films in compilations but in most cases, it specifically withheld such rights.

13. For each Feature delivered by LTE to CVI practice to the Purchase Agreements, LTE delivered to CVI artwork and photographs relating to each such Feature to be used by CVI or its licensees to produce and manufacture printed videocassette packaging in which to distribute the Features in the Purchased Territory, and to prepare related marketing materials in connection with that distribution.

14. LTE produced a large number of compilation video tapes which included scenes or portions of scenes from one or more of the Features. In addition to distributing these compilations in the U.S. market, LTE caused over 400,000 copies of these Illegal Compilations to be sold or distributed in CVI's Foreign Territory, including Europe, in derogation of CVI's exclusive rights under the Purchase Agreements. The Court found, *inter alia*, that LTE intentionally and repeatedly breached the Purchase Agreements by distributing these Illegal Compilations in CVI's exclusive Purchased Territory in direct competition with CVI's attempts to distribute the Features.

15. The boxes and covers of the Illegal Compilations and other marketing materials, including catalogues, used by LTE and their affiliates to market and advertise the Illegal Compilations ("IC") in CVI's exclusive Foreign Territory were identical in some cases and deceptively similar in others to CVI's detriment and the public's confusion.

16. LTE admitted that it sold and/or distributed hundreds of thousands of IC in CVI's exclusive Foreign Territory which included excerpts from the Features as to which CVI owned exclusive rights in the Foreign Territory. Joint Trial Exhibit 3 is a schedule prepared by LTE (the "Schedule") which sets forth the title and product number of each of the IC which LTE admits it sold or distributed in CVI's exclusive Foreign Territory.

17. The Schedule lists the number of scenes from the Features which are included in each of the IC.

18. The Schedule identifies the specific territories into which each such Illegal Compilation was sold or distributed by LTE.

19. LTE and its president, Mark Carriere, entered into a partnership with Jim Turner to distribute IC in Europe. LTE caused over 400,000 units of IC to be shipped to its partnership or to be manufactured by the partnership for sale in Europe.

20. The average sales price of those IC by the Partnership in Europe was approximately $8 depending upon the then applicable exchange rate between American Dollars and Dutch Guilders. The cost to the Partnership of each of said 400,000 units was $1.00.

21. On at least one occasion, LTE shipped 194 individual units of the Features themselves to its partnership in Europe for sale to its European customers.

22. In addition to the IC shipped to or manufactured by LTE's partnership in Europe, LTE caused hundreds of thousands of copies of IC to be shipped to Orion and other distributors in and through CVI's exclusive Foreign Territory.

23. CVI has been forced to engage attorneys to enforce and defend its rights under the Foreign Purchase Agreements.

24. The Court also found that LTE had willfully infringed CVI's rights under copyright as to 252 of the Features purchased by CVI pursuant to the Purchase Agreements. On July 28, 1997, at a status conference before the Court, CVI elected to seek statutory damages pursuant to §504 (c) of the Copyright Act and waived its right to a trial on the issue of actual damages. During the liability phase of the trial, the Court determined that LTE was liable to CVI on two alternative theories: copyright infringement and breach of contract. CVI's election to seek statutory damages was predicated on the

Court's ruling that CVI was entitled to statutory damages for LTE's willful copyright infringements and that the Court had jurisdiction to award those damages. Having elected statutory damages, CVI could not seek double recovery by additionally seeking an award of damages for breach of contract. Such a recovery would have been duplicative of the Court's award of statutory damages for copyright infringement. At no time did CVI either abandon or waive its claim to damages for breach of contract.

25. On December 18, 1997, the Court ordered that CVI was entitled to an award of statutory damages for copyright infringement in the amount of $20,000 for each of 252 works infringed for a total of $5,040,000. The Court further found that CVI was the prevailing party in the action and as such was entitled to recover its attorneys' fees and costs.

26. On July 2, 1999, the Ninth Circuit Court of Appeals reversed the District Court's award of statutory damages for copyright infringement on jurisdictional grounds but affirmed the District Court's Findings and Conclusions that LTE's distribution of the IC constituted breaches of CVI's exclusive rights under the purchase Agreements. The Court of Appeals remanded the case to the District Court for a trial to determine the amount of CVI's damages for LTE's breaches of contract.

27. CVI paid LTE in excess of $600,000 as consideration for its purchase of all rights in the Features exclusively and perpetually in and throughout the Foreign Territory. All of the rights purchased by CVI from LTE pursuant to the Purchase Agreements were exclusive to CVI in perpetuity.

28. By not demanding a jury trial in May, 1994 when LTE initially filed the Complaint in this case, LTE waived its right to a jury trial. The parties confirmed their waiver of jury trial when LTE and CVI entered into a written stipulation, contained in a Pre-Trial Conference Order filed on January 6, 1997, that all parties waive their right to trial by jury as to all matters in this case and that this case would be tried before this Court sitting without a jury.

29. The Court has had this case before it since it was filed in May 1994. The case was bifurcated at the request of LTE and the liability phase was tried before the Court sitting without a jury on January 30, 1997. The exercise of the Court's discretion to retain supplemental jurisdiction over the damage phase of the trial recognized the substantial resources that had been expended throughout that period. Further, the Court's retention of its jurisdiction in light of the substantial investment of judicial time and resources spent on the case was clearly in the interest of furthering judicial economy. convenience and fairness.

30. In 1988, when the first of the Purchase Agreements was entered into, Sidney Niekerk, the President of CVI, had been engaged in the foreign sales of adult film programming for many years. At that time, LTE and Carriere knew that CVI was an established business and was experienced as a seller or licensor of rights in adult motion pictures in and throughout the world. Both LTE and CVI, in entering into the Purchase Agreements, knew that the value of the agreements to CVI was the ability to generate future revenues and profits from the licensing or sale of rights in the Features in the Foreign Territory. Both parties understood that CVI intended to sell, license or otherwise exploit all rights in the Features.

Based on Mr. Niekerk's experience and expertise, it is reasonable to conclude that CVI's revenues from sales, licenses or other exploitation of the Features throughout their economic lives would be consistent with the revenues from the sales, licenses or other exploitation of comparable films.

31. Throughout the period from 1988-1993, both CVI and LTE understood that it was CVI's practice to license rights in the Features exclusively to a network of distributors in specific countries or groups of countries throughout the Foreign Territory for a limited period of time, after which the rights would revert to CVI and that CVI intended to follow that business practice with the Features purchased from LTE. In some cases, CVI licensed to its distributors the right to use excerpts from the films in compilations but in most cases, it specifically withheld such rights.

32. LTE's repeated breaches of the Purchase Agreements by its distribution of IC in CVI's Foreign Territory resulted in CVI losing the opportunity to market the Features as CVI saw fit.

33. LTE's breaches of the Purchase Agreements by its sale of hundreds of thousands of IC in the Foreign Territory has destroyed the value of the Features, rendered the Features valueless to CVI and has further destroyed the value of the compilation rights in the Features. As a result of LTE's conduct, the Features as well as the compilation rights are effectively valueless in the marketplace. CVI offered them for sale at "fire sale" prices and were unable to sell them even at such deeply discounted prices.

34. LTE's breaches of the Purchase Agreements by its sale of IC in CVI's exclusive territory have caused CVI to lose prospective revenues from its exploitation of the Features.

35. Lost profits from the marketing of the Features are the natural consequence of LTE's breaches of the Purchase Agreements.

36. CVI has demonstrated with reasonable certainty that profits would have been earned by CVI but for LTE's breaches of the Purchase Agreements. ME's repeated breaches of the Purchase Agreements have prevented performance of the agreement by CVI. CVI is entitled to damages based upon estimated or projected revenues which were prevented by LTE's breaches of the Purchase Agreements.

37. CVI's experience in licensing and/or selling films in and throughout the Foreign Territory affords a reasonable method of determining the loss and damages resulting from LTE's breaches of the Purchase Agreements.

38. Revenues earned by comparable adult films in the various markets in the Foreign Territory provide reasonable and persuasive evidence of the value of the prospective sales of the Features in those markets.

39. David Kravis is a recognized and qualified expert in the sale, distribution and other exploitation of adult films in the territories outside the United States and is duly qualified to opine as to what sales and/or license fees might have been reasonably expected by CVI from the exploitation of the Features throughout their economic lives.

40. Mr. Kravis' expertise was acknowledged by LTE during the testimony of Michael Kovacs. In fact, LTE had asked Mr. Kravis to testify as an expert witness on LTE's behalf in this case. Further, the testimony of Mr. Kravis is found to be credible. His estimates and his opinion are persuasive in every respect.

41. Jeffrey H. Kinrich is a recognized and qualified expert and is a partner in the firm of PricewaterbouseCoopers LLC. He is duly- qualified to opine as to the value of the Features calculated in accordance with generally acceptable methods of valuation. Further, the testimony of Mr. Kinrich is found to be credible. His opinions, methods and conclusions are persuasive in every respect.

42. It is an accepted and generally recognized method of valuation to estimate the value of the Features by referring to the value of comparable film catalogues.

43. Based upon his experience in the foreign marketplace, estimates by Mr. Kravis of the projected revenues from the Features provide persuasive evidence of the revenues which could be reasonably expected from CVI's exploitation of the Features over their economic lives, had they not been prevented from realizing those revenues by LTE's breaches of the Purchase Agreements.

44. Estimates of the projected sales of the Features based on comparable sales actually concluded by CVI and by Mr. Kravis provide a reasonable basis to estimate the value of the Features and the lost profits resulting from LTE's repeated breaches of the Purchase Agreements.

45. The testimony of Sidney Niekerk, Dani Duran, Eddie Dammann and David Kravis established that the Features were rendered valueless by LTE's repeated breaches of the Purchase Agreements. LTE's distribution of the IC in and throughout CVI's exclusive territory destroyed not only the value of the Features but any value in the compilations that could have been made from the Features.

46. The declaration of Mark Carriere filed in this case on May 11, 1994, confirms that the IC distributed by LTE in CVI's exclusive territory competed with and directly affected the value of CVI's rights in the Features. His declaration, under penalty of perjury, stated, in part, as follows:

> "7. . . . *If Defendants are permitted to continue making compilations of LTE's features, LTE may lose its European distributor as its profits would be severely impacted. . . .*" (emphasis added)

Mr. Carriere's declaration corroborates the testimony of Sidney Niekerk. Dani Duran, Eddie Dammann and David Kravis that LTE's distribution of IC in CVI's exclusive territory destroyed the value of CVI's rights in the Features.

47. The expert report of David Kravis, which was introduced into evidence during the trial, provided a reasonable and conservative estimate of the average revenue per Feature which CVI would have realized had LTE not breached the Purchase Agreements and flooded the foreign market with IC which were packaged with art and photographs similar to and in some cases, identical to those of CVI's Features. That estimate was $25,000

per feature. The opinions expressed by Mr. Kravis in his expert report and in his testimony before the Court were uncontradicted by any competent testimony or evidence introduced by LTE.

48. The declarations of Todd Blatt and Les Adams introduced by LTE in the liability phase of the trial corroborated the estimates of both Mr. Kravis and Mr. Niekerk as to the value of the Features and the projected revenues which might reasonably have been expected by CVI from their exploitation of the Features in the Purchased Territory.

49. The testimony of David Kravis regarding the projected profits which might reasonably have been expected from the exploitation of the Features in the absence of LTE's repeated breaches of the Purchase Agreements was uncontradicted by any competent testimony or evidence introduced by LTE. His estimates of projected revenues and profits were based on his knowledge of the market and empirical data regarding sales of similar films of comparable value. His report and his testimony were credible and his estimates provide, with reasonable certainty, an approximation of the lost profits suffered by CVI as a result of LTE's repeated breaches of CVI's rights under the Purchase Agreements.

50. Calculations as to the value of the Features by Mr. Kinrich based upon sales results of comparable catalogues, sales of comparable films and estimates by Mr. Kravis provide a reasonable approximation of the value of the Features and the lost profits suffered by CVI as a result of LTE's repeated breaches of the Purchase Agreements.

51. The testimony of Jeffrey Kinrich based on the estimates of Mr. Kravis regarding projected revenues from the Features was uncontradicted by any competent testimony or evidence introduced by LTE. The methodology employed by Mr. Kinrich in calculating CVI's lost profits was uncontradicted by any competent testimony or evidence introduced by LTE. His methods conform to generally accepted principles of valuation and calculate with reasonable certainty, the lost profits suffered by CVI as a result of LTE's distribution of IC in CVI's exclusive Foreign Territory.

52. Mr. Kravis estimated that the projected revenue for each of the Features would average $25,000.00 for each of the 252 Features as to which CVI held exclusive foreign rights. The total therefore of the projected revenue from the exploitation of the Features was $6,300,000. CVI actually realized gross revenues from its exploitation of the Features in the amount of $1,069,342.00. The total damage, therefore, and the profits lost due to LTE's breaches is $5,230,658.00. This is the amount calculated by Mr. Kinrich based upon the estimates of Mr. Kravis which are corroborated by LTE's own witnesses and which represent, with reasonable certainty, the amount of damage suffered by CVI as a result of LTE's distribution of IC in CVI's exclusive Foreign Territory.

53. LTE called only two witnesses during the damage phase of the trial: Michael Kovacs and Charles Winick, Ph.D. Mr. Kovacs' testimony was not credible.

54. Mr. Winick was called as an expert. In the initial examination as to his qualification, Mr. Winick acknowledged that while he had expertise in the arm of consumer gratification patterns as they relate to feature films and compilations, he had no expertise or

knowledge about the value of adult films in an economic sense. Accordingly, his testimony was of no assistance to the Court in determining the value of the Features or the lost profits suffered by CVI as a result of LTE's breaches.

55. In addition to the loss of the total value of the Features, CVI has suffered substantial loss to its business and goodwill as a direct and proximate result of LTE's repeated breaches of the Purchase Agreements.

56. CVI is the prevailing party in this action, and as such, is entitled to recover its attorneys' fees and costs incurred in this action.

II.

CONCLUSIONS OF LAW

1. This Court's jurisdiction over the contract claims in this case is based on supplemental jurisdiction authorized by 28 U.S.C.A. § 1367. Since the Federal claim has been eliminated on jurisdictional grounds, the decision to exercise supplemental jurisdiction is within the discretion of the trial court. That discretion should be exercised where there has been a substantial investment of judicial time and resources in the case which justifies the exercise of jurisdiction over the State's contract claim even after the federal claim has been dismissed. *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc); *Hansen v. Sioux By-Products*, 988 F. Supp. 1255, 1261-1265 (N.D. Iowa 1997). The exercise of the Court's discretion to retain supplemental jurisdiction over the damage phase of the trial takes cognizance of the substantial resources that have been expended by the Court and counsel throughout the period from May 1994, when the case was filed, to the present. Further,

the Court's retention of its jurisdiction in light of the substantial investment of judicial time and resources spent on the case was clearly in the interest of furthering judicial economy, convenience and fairness.

2. After analysis of the Purchase Agreements and after considering all of the evidence offered by both parties, it is clear that the Purchase Agreements convey all rights, including the entire copyright, and all rights existing under copyright in and throughout the Purchased Territory in the Features to which they respectively relate (the "Foreign Territory"). Such rights specifically include the right to make new separately copyrightable derivative works based on the Features, including compilations which include excerpts copied from the Features, and each and all of those rights are exclusive to CVI in the Foreign Territory in perpetuity. *See SAPC, Inc. v. Lotus Dev. Corp.*, 921 F.2d 360, 363-64 (1st Cir. 1990); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1440-41 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995).

3. At the conclusion of the liability phase, the Court determined that CVI was entitled to a declaration that its exclusive rights under the Purchase Agreements include all rights in the Foreign Territory in, related to or arising out of the 257 motion pictures which are the subject of this action. Those rights include all rights under copyright (17 U.S.C. § 106) and the sole and exclusive right to sell, distribute and market and otherwise exploit all or any portion of the Features in the Foreign Territory. They further include the sole and exclusive right to make, sell, distribute, market and otherwise exploit derivative works from the Features, including compilations featuring excerpts from the Features in the Foreign Territory. Any violation of CVI's exclusive rights constitutes a

breach of CVI's contractual rights under the Purchase Agreements. 28 U.S.C. § 2201 (a). *See also Hal Roach Studios v. Richard Finer & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1990); *cf. Societe de Conditionnement en Aluminium v. Hunter Eng'g. Co., Inc.*, 655 F.2d 938, 946 (9th Cir. 1981).

4. LTE's distribution of hundreds of thousands of copies of IC which included excerpts of CVI's Features in CVI's exclusive Foreign territory was a breach of CVI's exclusive rights under the Purchase Agreements. Where, as in this case, a contract conveys an exclusive right to sell, any violation of that exclusivity is a breach. LTE's distribution of IC in CVI's exclusive Foreign Territory was a violation of CVI's exclusive rights under the Purchase Agreements.

5. During the liability phase of the trial, the Court determined that LTE was liable to CVI on two alternative theories: copyright infringement and breach of contract. The Court found that in addition to violating CVI's rights under the Purchase Agreements, LTE had willfully infringed CVI's rights under copyright as to 252 of the Features purchased by CVI pursuant to the Purchase Agreements. On July 28, 1997, at a status conference before the Court, CVI elected to seek statutory damages pursuant to §504 (c) of the Copyright Act and waived its right to a trial on the issue of actual damages. 17 U.S.C. §504. The Court, after analyzing evidence presented by both parties and hearing the arguments of counsel, awarded CVI statutory damages in the amount of $20,000.00 per work infringed for a total of $5,040,000.00.

6. On July 2, 1999, the Ninth Circuit Court of Appeals reversed this Court's award of statutory damages for copyright infringement on jurisdictional grounds. In its Memorandum Opinion dated July 2, 1999, the Ninth Circuit affirmed all of this Court's findings relating to CVI's claims for breach of contract and remanded the case to the District Court for a trial to determine CVI's actual damages as a consequence of LTE's breaches of the Purchase Agreements.

7. Counsel for LTE has argued that by electing to seek statutory damages based on the Court's finding that LTE had willfully infringed copyrights owned by CVI, CVI waived its right to seek actual damages for breach of contract. The Ninth Circuit Court of Appeals, in *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1197 (9th Cir. 1986) faced with the same argument, held that:

> "The theories [copyright and contract] were argued in the alternative. Landsberg received an amount equal to defendants' profit from the use of his manuscript in damages for defendants' infringing use. Having obtained this relief, he could hardly have been expected to assert his alternative contract theory on appeal. To do so would have been to seek double recovery. Further, Landsberg correctly argues that this court's remand for further findings on the contract claim establishes as the law of the case that the claim was neither abandoned nor waived. Defendants' waiver argument must be disregarded."

8. CVI's election to seek statutory damages was predicated on the Court's ruling that CVI was entitled to statutory damages for LTE's willful copyright infringements and that the Court had jurisdiction to award those damages. Having elected statutory damages,

CVI could not seek double recovery by additionally seeking an award of damages for breach of contract. Such a recovery would have been duplicative of the Court's award of statutory damages for copyright infringement. At no time did CVI either abandon or waive its claim to damages for breach of contract. The Ninth Circuit's remand to the District Court to ascertain damages for breach of contract after having specifically affirmed all of the District Court's findings regarding the contact, established the law of the case: There was no abandonment or waiver of CVI's right to prove and recover its actual damage resulting from LTE's breaches of the Purchase Agreements. *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F. 2d 1193, 1197 (9th Cir. 1986).

9. Each of the Purchase Agreements provides that it is to be interpreted and construed according to California law and therefore, CVI's right to damages caused by LTE's repeated breaches of the Purchase Agreements is governed by California Civil Code § 3300.

> California law, on which the district court and the parties rely, provides that after a contract is breached, "the measure of damages ... is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civil Code § 3300 (West 1999). However, "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Cal. Civil Code § 3301 (West 1999). When it is clear that a party has been damaged, uncertainty regarding the precise amount of damages is not a reason to deny recovery. *See California Lettuce Growers Inc. v. Union Sugar Co.*, 45 Cal. 2d 474, 289 P.2d 785,

> 793 (Cal. 1955). "The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Id. See also GHK Associates v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 274 Cal. Rptr. 168, 179 (Cal. Ct. App. 1990) (stating that "[w]here the fact of damages is certain, the amount of damages need not be calculated with absolute certainty.").

Dominium Management Services, Inc. v. Nationwide Housing Group, 195 F.3d 358, 363-64 (8th Cir. 1999).

10. CVI had been in operation as a company whose focus was the sale and licensing of adult films in the foreign marketplace for several years prior to the Purchase Agreements and its activities during those prior years provide a reasonable basis for the determination of CVI's loss of prospective profits as a consequence of LTE's breaches of the Purchase Agreements. *See Hoag v. Jenan*, 86 Cal. App. 2d 556, 563-64 (Cal. Dist. Ct. App. 1948); *Mann v. Jackson*, 141 Cal. App. 2d 6, 12 (Cal. Dist. Ct. App. 1956). Both LTE and CVI knew at the time they entered into the Purchase Agreements that CVI would sell or license the Features or rights therein throughout the Foreign Territory. Both parties understood that CVI's purpose in purchasing the foreign rights in the Features was to re-sell or license rights for profit. *See A.A. Baxter Corp. v. Colt Indus., Inc.*, 10 Cal. App. 3d 144, 155 (Cal. Ct. App. 1970); *Allen v. Jones*, 104 Cal. App. 3d 207, 210 (Cal. Ct. App. 1980).

> California law provides for the recovery of damages for breach of contract "which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal.

> Civ. Code § 3300 (West 1970). *California decisions interpreting this section allow the recovery of lost profits where both parties contemplated a resale of contract goods by the purchaser.* (citations omitted). In the case before us, the district court found that Rosenfeld knew that Cohn was attempting to obtain the films for redistribution in Europe. The evidence shows that Rosenfeld had previously licensed some of the same films to another European distributor. *As a sophisticated businessman with experience in motion picture distribution, Rosenfeld must have known that Cohn and Film Productions intended to resell the films. . . . Cohn and Film Productions were therefore entitled to recover their lost profits.*

Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984) (emphasis added).

11. CVI has demonstrated that profits would have been earned by CVI but for LTE's breaches of the Purchase Agreements. "It is well established that damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of contract." *Dulien Steel Products Inc. v. A. J. Indus., Inc.*, 264 Cal. App. 2d 540, 553 (Cal. Ct. App. 1968): *See also Mahoney v. Founders' Insurance Company*, 190 Cal. App. 2d 430, 436 (Cal. Dist. Ct. App. 1961) and *Mann v. Jackson*, 141 Cal. App. 2d 6, 12 (Cal. Dist. Ct. App. 1956).

12. The Ninth Circuit has held that under California Civil Code § 3300, an award of lost profits for breach of a foreign licensing agreement involving a "package" of films is proper where the parties to the agreement contemplated a resale of the films. As the package consisted of motion pictures of differing values, it is appropriate

to ascertain lost profits relating to the package rather than the value of the individual films in the package. The award of lost profits under such circumstances is neither unforeseeable or speculative. *See Cohn v. Rosenfeld*, 733 F.2d 625, 630-31 (9th Cir. 1984) (citing *Tomlinson v. Wander Seed & Bulb Co.*, 177 Cal. App. 2d 462, 472-73 (Cal. Dist. Ct. App. 1960).).

13. David Kravis and Jeffrey Kinrich are each experts well qualified to assist the Court in calculating CVI's damages caused by LTE's breaches of the Purchase Agreements and in determining the amount thereof.

14. David Kravis has spent many years in the distribution of adult films in the foreign marketplace. He has special knowledge of the practices and the nature and terms of transactions relating to the sale or licensing of adult films in the territory outside the United States. "Expertness is relative to the subject and any person who has special knowledge, skill or experience in any occupation, trade or craft may be qualified as an expert in his field." *People v. King*, 266 Cal. App. 2d 437, 443 (Cal Ct. App. 1968).

The use of experts to testify in contractual disputes involving the distribution of motion pictures has long been recognized. *See Posttape Associates v. Eastman Kodak Co.*, 68 F.R.D. 323, 334-35 (E.D. Pa. 1975) (ruling that expert testimony was admissible to prove damages of prospective profits from breach of contract.) *See also Gold Seal Prod. v. R.K.O. Radio Pictures Inc.*, 134 Cal. App. 2d 843, 866 (Cal. Dist. Ct. App. 1955) (permitting expert testimony by a witness who had "extensive experience in the production of motion pictures" to show that film rights and a script "had lost all of its value.")

15. Where proper expert testimony is uncontradicted and no reason appears to doubt the credibility of the witness or the accuracy or inherent probability of the opinion, the fact should be deemed established. *See Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1971); *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 299 (1929). The expert report and testimony of Mr. Kravis were detailed in their analysis of the lost profits suffered by CVI by virtue of LTE's breaches of the Purchase Agreements. LTE made no attempt to introduce evidence or testimony to contradict Mr. Kravis.

Similarly, under California law, the court has broad discretion to determine an expert witness' qualifications. *See People v. Stanley*, 36 Cal. 3d 253, 261 (1984). If the witness is shown to have special knowledge of the subject, it is an abuse of discretion to refuse to permit him or her to testify as an expert: "If a witness has passed this threshold, the question of the degree of the witness's knowledge goes to the weight of the testimony rather than to its admissibility." *Jeffer, Mangels & Butler v. Glickman*, 234 Cal. App. 3d 1432, 1443 (1991).

Here, both Mr. Kravis and Mr. Kinrich have special knowledge, skill and experience within their respective fields. They are experts well qualified to assist the Court in calculating and determining the extent and amount of CVI's damages.

16. CVI suffered a loss of goodwill by virtue of LTE's repeated breaches of the Purchase Agreements. Loss of goodwill is an appropriate and proper element of damages for breach of an exclusive distributorship contract. *Ross v. Dunne Co.*, 119 Cal. App. 2d 690, 702 (1953).

17. The Court finds for the Defendants/Counter-claimants in the amount of $5,230,658, calculated as set forth in the expert report of Jeffrey H. Kinrich. (Def.'s Trial Ex. CVI 2017.) The Court finds that the Defendants/Counter-claimants have met their burden of showing certainty of damages under Cal. Civil Code § 3301 (West 1997).

18. CVI is the prevailing party in this action, and as such, is entitled to recover all of its costs, including reasonable attorneys' fees incurred in this action. Fed. R. Civ. P. 54(d); Cal. Civ. Code § 1717(a).

DATED: October 19, 2000

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 21 2002
CATHY A. CATTERSON, CLERK
US COURT OF APPEALS

LEISURE TIME ENT., an Indiana corporation; GLOBAL VIDEOS, INC., d/b/a TRANS GLOBAL FILMS, an Indiana corporation,

Plaintiffs-Appellants,

v.

CAL VISTA; SIDNEY NIEKERK; LLOYD ROBINSON,

Defendants-Appellees.

No. 00-57005

D.C. No. CV-94-2873-MRP(JGx)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California,
Mariana R. Pfaelzer, District Judge, Presiding.

Argued and Submitted March 12, 2002
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as provided by 9th Cir. R. 36-3.

Before KOZINSKI and GOULD, Circuit Judges, and BREYER, District Judge.**

1. The district court did not err in admitting the expert testimony of David Kravis and Jeffrey Kinrich. Kravis was a twenty-year veteran of the adult film industry with "specialized knowledge" and experience. *See United States v. Hankey,* 203 F.3d 1160 (9th Cir. 2000). Kinrich merely applied basic accounting calculations to the estimates provided by Kravis.

2. The district court abused its discretion in awarding lost profit damages of $5,230,658.

We review a district court's award of damages for an abuse of discretion. *See Security Farms v. Int'l Bhd. of Teamsters,* 124 F.3d 999, 1015 (9th Cir. 1997). An award of lost profit damages, such as the one here, will be upheld if it is supported by "substantial evidence." *See Humetrix, Inc. v. Gemplus,* 268 F.3d 910, 919 (9th Cir. 2001). Under California law "[n]o damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Cal. Civ. Code § 3301.

In awarding $5,230,658 in damages, the district court explicitly credited David Kravis's estimate that each of the 252 Leisure Time Entertainment, Inc. ("LTE") features would have generated $25,000 in revenue.[1] Because Kravis's opinion was unsupported by substantial evidence, it was erroneous for the district court to rely on it. In

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** Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

[1] The Kinrich report calculates damages in four distinct ways. While each method produced a similar result, only the Kravis estimate of $25,000 per feature produced a damages estimate of precisely $5,230,658.

particular Kravis's expert testimony, and by implication the district court's award of damages, fails to adequately account for the following evidence adduced at trial.

A. Form and Timing of Sales

Cal Vista ("CVI") generally sold its rights in the LTE features to foreign distributors for a period of seven years for a fixed sum. Accordingly, after the contract was executed, CVI assumed no economic risk for a period of seven years. While compilations might affect the profits realized by the foreign distributor that purchased rights to the LTE features from CVI, compilations would not affect CVI's profits for the seven-year period.

Theoretically the introduction of compilations could affect the value of CVI's residual rights in the features. But as Kravis and other experts testified, adult features have very short shelf lives. Seventy-five percent of the revenue is captured in the first three years. Indeed, only about fifteen percent of all features have any renewal value at all. *See* Reporter's Transcript, July 15, 2000 at 86. And even those features that are renewed are typically renewed at a significantly reduced price — 15 to 20 percent of the original price. *Id.*

CVI captured most of the home video revenue it could expect from licensing the LTE features upon the initial sale of rights to the foreign distributor. In many cases, these sales took place before any compilations were released anywhere. The CVI purchases from LTE commenced more than two years before illegal compilations entered the foreign market. Therefore the compilations should not have affected the profits generated by CVI's sales prior to mid-1990. With regard to these sales, any injury to CVI would involve the residual value of the features which, as discussed above, was minimal. While the parties

failed to fully develop how many of the LTE features were licensed prior to mid-1990, the number is large enough to call the damages calculation into serious question.

B. Comparability of Films

Kravis's opinion is based on the implicit assumption that the 23 films from Coastline Films, Inc. ("Kravis films") are comparable, in terms of potential to generate revenue, to the 252 LTE features acquired by CVI. In crediting Kravis's opinion, the Court implicitly endorsed this underlying similarity. However, the record reveals little evidence to support such a conclusion.

First, Kravis's expert report never expresses an opinion as to whether the Kravis films were similar, in any manner, to the 252 LTE features.[2] By contrast, the report expresses the opinion that the 200 films that Coastline produced for the Spice Channel are similar to the 252 LTE features, an opinion that LTE apparently does not challenge.[3] The only evidence in the expert report that the Kravis films were comparable to the 252 LTE features is that they were produced over the same time period and on the same medium, video. At trial, Kravis offered the opinion that the Kravis films were comparable in economic value to the 252 LTE features. But this opinion appears to be based only on watching the 252 features for a total of 3.5 hours, and the evidence cited above. *See* Excerpts of Record 1013.

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[2] Kravis admitted this at trial. *See* Reporter's Transcript, July 19, 2000 at 65-66.

[3] According to the Declaration of Michael Kovacs, the average foreign revenue already generated by the CVI features was $4,243, while the average revenue earned by the 200 Spice Channel films overseas was $4,509.

Besides the questionable basis for the opinion itself, there are other reasons to question the conclusion that the 23 Kravis films provided an appropriate metric for calculating damages. Mr. Charles Winick testified that the Kravis films and the LTE features were not comparable. Among other differences, Winick testified that the Kravis films were longer, had more popular actors and directors, and had more attractive titles. *See* Reporter's Transcript, July 20, 2000 at 63. While Winick was not qualified to give an opinion regarding the economic impact of these differences, the impact is obvious — all of these differences would suggest that the LTE features had less potential to generate revenue.

Winick's opinion is corroborated by evidence in the record. The production costs of the Kravis films averaged $14,500 per film. *See* Plaintiff's Exhibit 93. The production costs of the LTE features averaged $5,000. It is logical to infer that some of the extra $9,500 was spent on more recognized directors and bigger "stars." While the profitability of any particular feature can be difficult to predict, these factors would in the aggregate be expected to have a positive affect on revenues.

The state of the evidence regarding the comparability of the Kravis films and the LTE features is especially troubling because the district court's award of damages relied heavily on the existence of such comparability. This reliance resulted from the fact that direct evidence that the compilations were the proximate cause of injury to CVI was relatively undeveloped.

The proposition that distribution of compilations will hurt the profitability of underlying features is rather unremarkable. But the effect that the distribution of compilations will have on profits varies according to 1) the number of scenes from the features in the

compilations, 2) whether the compilations and the features were released in the same territory, 3) whether the compilations and the features were released at the same time, and 4) the similarity in packaging of the compilations and the features. *See* Reporter's Transcript July 14, 2000 at 80-90. While neither party developed comprehensive evidence of these factors, it is clear that the overlap was less than complete. Some features were licensed in territories where compilations were never sold. Some features were licensed in territories where compilations came on the market only years later. And in some territories, the released compilations were composed of scenes from features other than those licensed in the territory. The district court erred by relying on the unsubstantiated opinion that the Kravis films were economically comparable to the LTE features.

Even if the Kravis films were of comparable economic value to the 252 LTE features, and as stated above there is significant evidence to suggest they were not, the Kravis films earned on average only $18,096 — 28 percent less than the $25,000 estimate used to calculate damages. Apparently the $6,904 per film difference was an estimate of revenue that could be expected from compilations, broadcast, Internet, DVD licensing, CD-ROM licensing, and Pay-Per-View. This estimate is based merely on speculation; the Kravis films had not generated such revenue.

C. Residual Value

The district court also found that the 252 LTE features were "rendered valueless" by LTE's breaches of the purchase agreements. Findings of Fact and Conclusions of Law Regarding Damages for Breach of Contract at 11. Again there is evidence in the record to contradict this finding. For example, in 1995 CVI sold most of the 252

film library to a distributor in South Africa for $50,400. In light of the uncontested testimony that most films lose significant value after 3 years, this appears to be a significant level of residual value.[4]

D. Conclusion

CVI paid a total of slightly more than $600,000 for the 252 LTE features — generally between $1,500 and $2,500 per film. Findings of Fact and Conclusions of Law Regarding Damages for Breach of Contract at 8. By their own admission, they have already earned $1,069,342 selling rights to those features — a healthy return. The testimony of Kravis suggests that they should have reaped $6,300,000, a ten-fold return on their investment.

Such a return is not supported by substantial evidence. Accordingly, the damages award is hereby VACATED and REMANDED.

3. LTE waived its right to a jury trial. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) did not provide a basis for LTE to demand a jury trial after having previously waived the right twice. *Feltner* merely held that a party is entitled to a jury trial in the determination of statutory copyright damages. This is a right that LTE thought they already enjoyed when it was waived.

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[4] It is difficult to discern from the record, but it does not appear that illegal compilations were distributed in South Africa. If that is indeed the case, this example highlights the importance of a more detail proximate cause analysis.

4. CVI neither waived nor abandoned its right to recover actual damages for breach of contract. CVI elected statutory damages after the district court held it was entitled to statutory damages. As the district court noted: "Having elected statutory damages, CVI could not seek double recovery by additionally seeking an award of damages for breach of contract." Findings of Fact and Conclusions of Law Regarding Damages for Breach of Contract at 17.

5. The district court did not abuse its discretion in retaining supplemental jurisdiction over CVI's state law claim for breach of contract. The breach of contract claim "derive[d] from a common nucleus of operative facts." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966). Having invested considerable judicial resources in the case since it was filed in 1994, retaining jurisdiction "furthered considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726.

6. Having vacated the damages award, we also vacate the attorney's fee award. The district court shall address attorney's fees upon determination of final judgment.

VACATED AND REMANDED.

A TRUE COPY
CATHY A CATTERSON
Clerk of Court
ATTEST

AUG -6 2002

by /s/
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 17 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

LEISURE TIME ENT., an Indiana corporation; GLOBAL VIDEOS, INC., d/b/a TRANS GLOBAL FILMS, an Indiana corporation, Plaintiffs-Appellants, v. CAL VISTA; SIDNEY NIEKERK; LLOYD ROBINSON, Defendants-Appellees.	No. 00-57005 D.C. No. CV-94-2873-MRP(JGx) ORDER

Before: KOZINSKI and GOULD, Circuit Judges, and BREYER, District Judge.[1]

By way of clarification, the memorandum disposition filed in this case on May 21, 2002 does not preclude the retrial and recalculation of damages. Nor is the memorandum disposition meant to provide a detailed road map for the district court on retrial. It is left to the

[1] Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

district court's judgment as to how best to develop a new evidentiary record that will support a damages award, whether that be through declarations, testimony, or other appropriate means.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 06 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

LEISURE TIME ENT., an Indiana corporation; GLOBAL VIDEOS, INC., d/b/a TRANS GLOBAL FILMS, an Indiana corporation,

Plaintiffs-Appellants,

v.

CAL VISTA; SIDNEY NIEKERK; LLOYD ROBINSON,

Defendants-Appellees.

No. 00-57005

D.C. No. CV-94-02873-MRP-03

ORDER

Before: **KOZINSKI** and **GOULD**, Circuit Judges, and **BREYER**,* District Judge.

We agree with Cal Vista that Leisure Time has not shown that the district judge was biased. Nevertheless, because this is the third remand, the appearance of justice and sound judicial administration will be served

* The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

by having further proceedings conducted before another district judge. *See United States* v. *Arnett*, 628 F.2d 1162, 1165 & n.5 (9th Cir. 1979).

Plaintiff-Appellant Leisure Time Entertainment's Motion for an Order To Remand the Case to a Different District Judge is GRANTED. The mandate shall now issue forthwith.

A TRUE COPY
CATHY A CATTERSON
Clerk of Court
ATTEST

AUG -6 2002

by /s/
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
CLERK, U.S. DISTRICT COURT
AUG 15 2002
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

NO. 00-57005
CT/AG# : CV-94-02873-MRP-03

LEISURE TIME ENT., an Indiana corporation;
GLOBAL VIDEOS, INC., d/b/a TRANS
GLOBAL FILMS, an Indiana corporation

Plaintiffs - Appellants

v.

CAL VISTA; SIDNEY NIEKERK;
LLOYD ROBINSON

Defendants - Appellees

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CLERK, U.S. DISTRICT COURT
AUG -9 2002
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED and REMANDED.

Filed and entered May 21, 2002

ENTER ON ICMS
AUG 19 2002
/s/

A TRUE COPY
CATHY A CATTERSON
Clerk of Court
ATTEST

AUG -6 2002

by /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
CLERK, U.S. DISTRICT COURT
AUG 25 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
AUG 25 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

Priority ✓
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Closed
JS-5/JS-6 NO
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LEISURE TIME ENTERTAINMENT, an Indiana corporation; and GLOBAL VIDEOS, INC., dba TRANS GLOBAL FILMS, an Indiana corporation,

Plaintiffs,

vs.

CAL VISTA, SIDNEY NIEKERK, LLOYD ROBINSON, and DOES 1 through 50,

Defendants.

Case No. CV 94-02873 CAS (VBKx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I. INTRODUCTION

Plaintiff and counterdefendant Leisure Time Entertainment, Inc. ("LTE") is a corporation organized and existing under the laws of the State of Indiana and having its principal place of business in the Central District of California.[1] *See* April 24, 1997 Findings of Facts and Conclusion of Law ("April 24, 1997 Findings") ¶ 1.[2] Plaintiff Global Videos, Inc. ("Global") is a corporation organized and existing under the laws of the State of Indiana, qualified to do business in the State of California, with its principal place of business in the Central District of California. April 24, 1997 Findings ¶ 2. The parties have stipulated that for purposes of this action, LTE is deemed to be responsible for the acts and omissions of Global. The LTE Parties are, and at all relevant times were, in the business of producing adult motion pictures for distribution throughout the world in the form of videocassette and other formats. April 24, 1997 Findings ¶ 6.

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[1] For purposes of this Order, LTE includes the following affiliated companies and fictitious names under which it does or has done business: National Video, Nation-Wide Video Distributors, Leisure Time Communications, Video Exclusives, Mark Curtis Productions, Multi-Media, Infinity Video, Venus Video, Platinum Pictures, Ecstacy Video, Golden West Video, Canyon Video, Red Hot Video, Tux Video, Pirate Video, Boss Video, Rebel Video, Stallion Video, Keyhole Video, and Rawhide Video. All of said companies, tradenames, dbas or corporate designations are herein referred to as "LTE".

[2] The Court's April 24, 1997 Findings were affirmed as to CVI's breach of contract claim, and remanded as to the issue of damages. *See Leisure Time Entertainment. Inc. v. Cal Vista*, 1999 U.S. App. LEXIS 15098 (9th Cir. 1999) (unpublished memorandum opinion). The Court cites the April 24, 1997 Findings only as to facts for which there can be no substantial dispute.

Cal Vista International, Ltd. ("CVI") is a corporation organized and existing under the laws of the State of California, doing business and having its principal place of business in the Central District of California. April 24, 1997 Findings ¶ 4. CVI was at all relevant times in the business of licensing and distributing adult motion pictures outside the United States. April 24, 1997 Findings ¶ 7.

CVI and LTE entered into a series of 39 Purchase Agreements, pursuant to which CVI purchased rights to 257 adult motion pictures (the "Features").[3] *See* Pls.' Exs. 1-39. CVI and LTE entered into the first of these Purchase Agreements on February 24, 1988. Pls.' Ex. 1. The last of the Purchase Agreements is dated April 26, 1993. *See* Pls.'s Ex. 39. Each of the Purchase Agreements contains the following language:

> [Leisure Time] hereby transfers, assigns and sells to [CVI], throughout the purchased Territory, the exclusive right, under copyright, to exhibit, to distribute, sell and otherwise deal in and exploit the Picture(s) and trailers thereof, in connection with [the Pictures identified in paragraph 1] in perpetuity, which shall include but not be limited to the full period of any copyright in the Picture(s) and all renewals, extension and continuations of any such copyright.

Pls.' Exs. 1-39. The "Purchased Territory" is defined in paragraph 2 of the Foreign Purchase Agreements as the entire world, excluding the United States and Canada. *Id.* As to fourteen of the LTE Features, the "Purchased

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[3] While CVI purchased rights to 257 of the Features, the Court found that LTE had willfully infringed CVI's rights only as to 252 of the Features. October 20, 2000 Findings ¶ 24.

Territory" is defined as the world, excluding the United States. *Id.* The term of each Purchase Agreement and of the rights granted to CVI thereunder, is in perpetuity. *Id.*

Each Purchase Agreement provides that it shall be construed and interpreted according to California law, and contains the following provision: "Should any litigation be commenced between the parties to this contract, arising out of this Agreement, the party prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for his attorney's fees in such litigation." Pls.' Exs. 1-39.

Throughout the relationship between LTE and CVI, it was CVI's practice to license specified rights (usually limited to home video cassette rights) in the Features to individual distributors in specific countries throughout the Foreign Territory. April 24, 1997 Findings ¶ 19. The license agreements granted exclusive rights for that country for a limited period of time, after which time the licensed rights would revert to CVI. *Id.* In some cases, CVI licensed to its distributors the right to use excerpts from the films in compilations, but in most cases, it specifically withheld such rights. *Id.*

For each Feature delivered by LTE to CVI pursuant to the Purchase Agreements, LTE delivered to CVI artwork and photographs relating to each such Feature to be used by CVI or its licensees to produce and manufacture printed videocassette packaging in which to distribute the Features in the Purchased Territory, and to prepare related marketing materials in connection with that distribution. April 24, 1997 Findings ¶ 30.

LTE produced a large number of compilation video tapes which included scenes or portions of scenes from one or more of the LTE Features. In addition to distributing these compilations in the United States market, LTE caused over 400,000 copies of the compilations to be sold or distributed in CVI's Foreign Territory, including Europe, in derogation of CVI's exclusive rights under the Purchase Agreements. April 24, 1997 Findings ¶¶ 29, 32, 35, 36, 38. The Court found, *inter alia*, that LTE intentionally and repeatedly breached the Purchase Agreements by distributing compilations in CVI's exclusive territory in direct competition with CVI's attempts to distribute the Features. *Id.*

II. PROCEDURAL BACKGROUND

LTE commenced this action on May 3, 1994, asserting a claim for copyright infringement arising out of CVI's distribution of compilations of the LTE Features in Europe.[4] On August 10, 1994, the Court granted CVI's motion for summary judgment. On March 14, 1996, the Court of Appeals for the Ninth Circuit reversed and remanded, concluding that the Purchase Agreements were ambiguous as to whether LTE had transferred the right to prepare derivative works, such as compilations, to CVI. *Leisure Time Entertainment, Inc. v. Cal Vista*, 1996 U.S. App. LEXIS 5751 (9th Cir. 1996) (unpublished memorandum opinion).

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[4] All proceedings herein, prior to the reassignment of this case to this Court on September 22, 2002, were conducted before the Honorable Mariana R. Pfaelzer, to whom this case was initially assigned.

The issue of CVI's liability was tried to the Court on January 30, 1997, January 31, 1997, February 3, 1997 and February 5, 1997. On July 31, 1997, the Court awarded CVI statutory damages pursuant to the Copyright Act, 17 U.S.C. §§ 504(c) and 505.

On July 2, 1999, the Ninth Circuit affirmed the Court's findings of fact and conclusions of law in regard to the breach of contract claim and remanded for a determination of contract damages, on the ground that the Court lacked jurisdiction to award statutory damages and attorneys' fees pursuant to the Copyright Act, 17 U.S.C. §§ 504(c) and 505. *See Leisure Time Entertainment, Inc. v. Cal Vista*, 1999 U.S. App. LEXIS 15098 (9th Cir. 1999) (unpublished memorandum opinion).

The issue of contract damages was tried to the Court on July 13, 2000, July 14, 2000, July 19, 2000, July 20, 2000, July 21, 2000 and July 25, 2000. On October 19, 2000, the Court entered judgment in favor of CVI in the amount of $5,230,658.00.

On May 21, 2002, the Ninth Circuit vacated the Court's damage award and remanded this action. *See Leisure Time Entertainment, Inc. v. Cal Vista*, 35 Fed. Appx. 565, 2002 U.S. App. LEXIS 9844 (9th Cir. 2002) (unpublished memorandum opinion).[5]

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[5] In particular, the Ninth Circuit concluded that the expert opinion of one of LTE's expert witnesses, David Kravis, was unsupported by substantial evidence, and that the Court's damage award failed to account for evidence that the compilations may have been released after CVI had sublicensed certain Features, and may not have been released in certain territories. *See Leisure Time Entertainment, Inc.*, 35 Fed. Appx. at 567.

On July 17, 2002, the Ninth Circuit ordered that "[b]y way of clarification" its May 21, 2002 opinion was not "meant to provide a detailed road map for the district court on retrial" and that "[i]t is left to the district court's judgment as to how best to develop a new evidentiary record that will support a damages award, whether that be through declarations, testimony, or other appropriate means." *Leisure Time Entertainment, Inc. v. Cal Vista*, 41 Fed. Appx. 925, 2002 U.S. App. LEXIS 15058 (9th Cir. 2002) (unpublished memorandum opinion).

On September 22, 2002, this action was randomly reassigned to this Court for a de novo determination of damages. The damages issues were tried to the Court on June 22, 2004, June 23, 2004, and June 24, 2004. The Court's findings of fact and conclusions of law are as follows:

III. DISCUSSION

CVI argues that it is entitled to recover all damages which it suffered as a result of LTE's marketing of compilations in the Foreign Territory. *See* CVI's Closing Statement ("CVI's Brief") at 1. In particular, CVI argues that LTE circulated approximately 300 separate compilations "in every county throughout Europe as well as Australia, Japan, Brazil and other countries throughout the world." *Id.*

LTE responds that the issue of whether CVI is entitled to any damages must be resolved before determining the amount of damages to award CVI. *See* LTE's Post-Trial Brief ("LTE's Brief") at 3. LTE contends that the Ninth Circuit never determined that CVI suffered damages, and instead "emphasized that the key issue of proximate cause still dominates the case." LTE's Brief at 3, citing *Leisure Time Entertainment v. Cal Vista*,

2002 U.S. App. LEXIS 9844, at *8 ("direct evidence that the compilations were the proximate cause of injury to CVI was relatively undeveloped"). LTE contends that CVI's failure to earn additional profits on the LTE Features "was a result of CVI's inundation of the market by releasing too many features at the same time." *See* LTE's Brief at 5.

The Court will separately examine whether LTE's distribution of compilations of the LTE Features proximately caused the reduction in the value of CVI's home video rights, compilation rights, broadcasting rights and other ancillary rights, and if so, whether such reduction in value can be quantified with sufficient certainty such that damages may be awarded.

A. Home Video Rights

(i) Proximate Causation

CVI asserts that there is no question that LTE's distribution of compilations reduced the value of CVI's home video rights to the Features. CVI's Brief at 10. In his supplemental expert report, Kravis opined that "the packaging which was utilized by Leisure Time in distributing the compilations in Europe was similar, and in some cases, identical to the packaging which Leisure Time had furnished to [CVI] in connection with [CVI's] acquisition of the features." Ex. CVI-3022 at 6. LTE's President, Michael Kovacs, testified that LTE sold the illegal compilations throughout Europe. RT 6/22/04 98:10-100:1. In his supplemental expert report, Kravis opined that,

> The international marketplace for adult films during the period of 1988 to 1995 was largely made up of countries from Europe. European sales made up the vast majority of the revenues from foreign sales of

> adult films made by American producers. The European adult film distribution community, at that time, was small in number and consisted of approximately 3 to 4 large distribution companies which had activities throughout the European continent and 3 to 5 individual distributors in each individual territory. It was a business where everybody knew everybody else and where all of the European distributors met in one place at least three times a year at the prominent European film markets.

Ex. CVI 3022 at 7.

LTE responds that the distribution of compilations did not reduce the value of CVI's home video licensing rights as to any of the Features. LTE's Brief at 12. In support of this contention, LTE asserts that Dani Duran Niekerk, a CVI employee who dealt with foreign sales for the past eighteen years, reaffirmed her prior testimony that CVI's customers, who had purchased exclusive home video rights in the LTE Features, had no objection to CVI's introduction of compilations into the same territories. *Id.*, citing RT 6/24/04 64:7-16. In addition, LTE argues that Kravis distributed compilations of video productions produced by Coastline Films, a Kravis-affiliated entity (referred to herein as "the Spice Films"), into the same territories where Kravis had distributed the Spice Films. *Id.*, citing RT 6/24/04 15:3-16:21. However, this evidence does not establish that LTE's distribution of compilations would have no economic impact on the sales of the underlying features by a competing distributor — namely CVI.

As such, based on the evidence proffered by CVI, the Court finds that LTE's distribution of compilations of the LTE Features proximately caused some reduction in the value of CVI's home video rights.

LTE also maintains that CVI could have obtained evidence establishing the precise territories in which the illegal compilations were distributed, in order to demonstrate that LTE's distribution of the compilations interfered with CVI's ability to license the LTE Features in each territory. LTE's Brief at 14. LTE asserts that CVI chose not to undertake a territory-by-territory analysis because some features were licensed in territories where compilations came on the market years later and in some territories, the illegal compilations were composed of scenes other than those included in the LTE Features. LTE's Brief at 14.

The Ninth Circuit noted that "CVI purchases from LTE commenced more than two years before illegal compilations entered the foreign market" in 1990. *See Leisure Time Entertainment, Inc.*, 2002 U.S App. LEXIS at *5. Accordingly, the Ninth Circuit reasoned that, "the compilations should not have affected the profits generated by CVI's sales prior to mid-1990." *Id.* The Ninth Circuit further stated that, "[w]hile the parties failed to fully develop how many of the LTE features were licensed prior to mid-1990, the number is large enough to call the damages calculation into serious question." *Id.*

The first of the Purchase Agreements was executed on February 24, 1988, and the last of the Agreements was executed on April 26, 1993. *See* Pls.' Ex. 1 and Pls.' Ex. 39. Without citing to evidence, CVI asserts that "[d]uring 1988 through 1989 . . . it received a total of 100" of the LTE Features. CVI's Brief at 20. Accordingly,

for the purpose of calculating lost profits, CVI concedes that it sublicensed these 100 LTE Features prior to the time when LTE first sold competing compilations, and therefore it did not suffer damage as to these 100 Features.[6] LTE responds that it licensed 67 Features to CVI in 1988, 49 Features in 1989 and 29 Features in the first half of 1990, for a total of 145 Features. LTE's Brief at 2, citing Pls.' Exs. 1-24. Based on the evidence in the record, the Court finds that LTE purchased rights to 67 of the Features in 1988, 49 of the Features in 1989, and 29 of the Features prior to November 1990. Pls.' Ex. 1-24. In particular, the evidence suggests that all 145 of these Features were licensed by LTE to CVI prior to the introduction of LTE's compilations into the market. Therefore, because the illegal compilations were first sold by LTE in mid-1990, it appears that CVI can establish that it suffered damages only with respect to the 107 LTE Features which CVI acquired after November 1, 1990. Because CVI's damage analysis assumes that it did not suffer damage as to any of the Features delivered to CVI prior to LTE's first sale of competing compilations, the Court finds that CVI can establish that it suffered lost profits only with respect to those 107 LTE Features which were delivered after the first sale of the LTE compilations in Europe in mid-1990.

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[6] Because CVI concedes that the compilations did not damage the home video rights of 100 of the Features, it calculates the projected revenue from the remaining 152 LTE Features to be $2,750,592. CVI's Brief at 19-20. In addition, CVI acknowledges that it actually received revenue in the amount of $1,069,342 from the Features. *Id.* Therefore, CVI contends that total lost profits as to the CVI's home video rights in the Features is equal to $1,681,250. *Id.*

(ii) Are the Kravis Films and the LTE Features Economically Comparable?

CVI seeks to establish the value of lost profits from home video rights to the LTE Features by comparing the revenue earned by a comparable group of films under similar marketing conditions. CVI's Brief at 1. In particular, CVI relies on a group of features from the library of Coastline Films ("the Kravis Films"), which CVI contends are comparable to the LTE Features. CVI's Brief at 2-3. CVI asserts that the Kravis Films produced income from home video cassette sales averaging $18,096 per film. CVI's Brief at 19. Therefore, CVI asserts that each LTE feature would produce $18,096 in income, such that the 252 features would earn $4,560,198. CVI's Brief at 19-20.

LTE argues that CVI's expert, David Kravis, employed flawed methodology in order to calculate CVI's lost profits stemming from the diminished value of the home video rights to the Features. Contrary to Kravis' conclusions, LTE contends that the Features were not economically comparable to the Kravis Films or the Spice Films. In particular, LTE contends that the Kravis Films had higher production costs, higher production standards, and were more successful than the LTE Features, such that the LTE Features are not comparable to the Kravis Films. Therefore, because LTE asserts that the LTE Features and the Kravis Films are not comparable, LTE concludes that Kravis cannot rely on Coastline Films' profit from the sale of home video rights to the Kravis Films as a proxy for CVI's lost profits. LTE's Brief at 15-16. Likewise, LTE argues that the LTE Features and the Spice Films are not economically comparable, because the Spice Films

were produced for cable, had production costs three times greater than those of the LTE Features, and were produced years after the LTE Features. LTE's Brief at 16-17.

Kravis testified that the Kravis Films are economically comparable to the LTE Features. RT 6/23/04 90:7-11. In particular, Kravis opined that the configuration, number of scenes and general organization of the Kravis Films and the LTE Features are very similar. RT 6/23/04 90:23-91:1. In his supplemental expert report, Kravis opined that "[t]he Kravis Films contain greater production values while the [LTE Features] compensate by featuring the performances of the most notable adult film "stars of their time." Ex. CVI-3022 at 4. Kravis further states that while the director of the Kravis Films, John Stagliano, "later became one of the most successful directors of adult films," the Kravis Films directed by Stagliano "were his early films and were of considerably less value than the Stagliano films of later years." *Id.* at 7.

The Court concludes that additional evidence in the record substantiates Kravis' opinion that the Kravis Films and the LTE Features are economically comparable. In particular, Dani Duran Niekerk testified that CVI had acquired Canadian rights to 15 of the 252 LTE Features, which CVI licensed to Hans Van Dermey, a Canadian distributor, for $4000 per Feature. RT 6/22/04 66:23-67:19, Ex. CVI-3060. Kravis testified that Coastline Films licensed eight of the Kravis Films to the same Canadian distributor, and received $3000 per film for six of the Kravis Films, $3500 for one of the films, and $2000 for the remaining film. RT 6/24/04 34:1-36:11. Accordingly, the fact that

the Kravis Films and the LTE Features generated similar licensing fees from the same distributor corroborates Kravis' expert opinion that the Kravis Films and the LTE Features are economically comparable.

LTE's expert, Charles Winick, testified that the Kravis Films were not comparable to the LTE Features. RT 6/24/04 165:21-167:21. In particular, Winick asserted that the Kravis Films were longer, had "better photography [and] lighting," more continuity, "more stars," a more distinguished director, and "catchier titles." *Id.* Winick is a professor of sociology and has conducted studies of the impact of pornography on the public.[7] *See, e.g.*, RT 6/24/04 161:8-164:22. However, Winick admitted that he "doubt[ed]" that he could project the values of two adult films in various territories around the world. RT 6/24/04 192:11-14. Winick testified that the Kravis Films utilized more prominent stars than the LTE Features; however, on cross-examination Winick was unable to recall the prominent adult film stars appearing in either the Kravis Films or the LTE Features, a fact which undermines the assumptions underlying his opinion. RT 6/24/04 179:5-15. Accordingly, the Court concludes that Winick's qualifications to render an expert opinion regarding the economic comparability of the LTE Features and the Kravis Films must be viewed with some skepticism, and therefore the Court declines to place significant weight on Winick's testimony.[8]

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[7] The Ninth Circuit has previously noted that Winick "was not qualified to give an [expert] opinion" as to the economic impact of differences between the Kravis Films and the LTE Features. *See Leisure Time Entertainment, Inc.*, 2002 U.S App. LEXIS at *7.

[8] On June 18, 2004, CVI filed a motion to exclude Winick's testimony pursuant to Fed. R. Civ. P. 26(a)(2)(B), on the ground that LTE failed to produce documents related to his expert testimony in response

In sum, the Court concludes that the Kravis Films and the LTE Features are economically comparable, so that the profit generated by the Kravis Film is a proper proxy for the profits that the LTE Features would have generated absent LTE's distribution of compilations in the Foreign Territories.

(iii) Residual Value of the Home Video Rights

The Court also finds that the residual value of the home video rights — *i.e.*, the value of the home video rights after CVI's sublicenses of the home video rights to other distributors expired — was rendered virtually valueless after LTE introduced the compilations into the Foreign Territories. Dani Duran Niekerk testified that she "sent a letter to everybody, every — single person we ever dealt with," offering to license rights for a price of $300 per Feature. RT 6/22/04 78:7-79:1. Dani Niekerk stated that only one distributor accepted this offer and "he didn't pick up the whole contract." RT 6/22/04 79:2-79:24. *See also* Ex. CVI-3059. Furthermore, Kravis stated that "the vast majority of income from an adult film would be generated in its first three years."[9] RT 6/23/04 27:23-28:6. Accordingly, the Court concludes that residual value of the home video rights to the LTE Feature is negligible.

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to a subpoena. However, the Court declines to exclude Winick's testimony, and thereby denies CVI's motion. Likewise, the Court also denies LTE's motion to strike Winick's testimony on the ground that Winick is not qualified to testify as an expert. *See, e.g.*, RT 6/24/04 165:10-18.

[9] The Ninth Circuit has previously credited Kravis' opinion, stating, "as Kravis and other experts testified, adult features have very short shelf lives." *See Leisure Time Entertainment, Inc.*, 2002 U.S App. LEXIS at *4. The Ninth Circuit further stated that "even those features that are renewed are typically renewed at a significantly reduced price — 15 to 20 percent of the original price." *Id.*

(iv) Calculation of Lost Profits as to Home Video Rights

The average revenue earned by the economically comparable Kravis Films was $18,096. Ex. CVI-2017. The projected home video revenue of the 107 Features which CVI received after LTE began to distribute compilations into the Foreign Territory totals $1,936,272. CVI acknowledges that it received revenue in the amount of $1,069,342 from all 252 Features. *See* October 20, 2000 Findings ¶ 52, *aff'd*, *Leisure Time Entertainment v. Cal Vista*, 2002 U.S. App. LEXIS 9844, at *10 (stating, CVI has "already earned $1,069,342 selling rights to [the LTE Features]"). Presumably, CVI earned the majority of its $1,069,342 in actual revenue from the 145 Features that CVI received prior to mid-1990, since these Features were acquired by CVI before the LTE compilations were sold in the Foreign Territory. While CVI has not proffered evidence as to what portion of the $1,069,342 it earned after LTE began distributing the compilations, the Court finds that some allocation of these revenues is appropriate. In light of the testimony that the 252 LTE Features are generally comparable, the Court will assume that CVI would have received revenues of $4,243.42 per Feature, *i.e.*, $1,069,342 divided by 252 Features. Because CVI acquired only 107 Features after LTE began distributing compilations in the Foreign Territory, the Court finds it appropriate to allocate no more than $454,046 in revenues, *i.e.* 107 Features multiplied by $4,243.42, of the $1,069,342 in revenues, to the period commencing after the compilations were first sold in the Foreign Territory.

Therefore, CVI's lost profit as to home video licensing rights is equal to the difference between the projected home video revenue of the 107 Features, *i.e.* $1,936,272, less the $454,046 in revenue actually received by CVI after mid-1990 in connection with those Features, or $1,482,226.

B. Broadcast, DVD, CD-ROM, Internet and Miscellaneous Rights

(i) DVD Rights

CVI contends that the DVD rights in the Features were worth $1,250 per Feature. CVI's Brief at RT 6/23/04 69:18-21. LTE responds that CVI's claim for lost profits totaling $315,000 as to CVI's DVD rights must be rejected because the market for distribution of adult films by DVD did not exist until 1998, and the DVD market was fueled by the release of new material, rather than the re-release of older films. *See, e.g.*, LTE's Brief at 10.

Kravis' damage estimate as to CVI's DVD rights relies in part on a license agreement dated January 21, 1998, licensing DVD rights for ten of the Spice Films, which Kravis asserts are comparable to the LTE Features. *See* RT 6/23/2004 79:3-80:6, Exs. CVI-3048, CVI-3049, CVI-3050, CVI-3051, CVI-3052. In addition, Kravis relies upon a March 7, 2000 agreement licensing DVD rights to twenty-five Spice Films within the European market at a price of $750 per film. *See* RT 6/23/2004 82:8-83:25.

However, Kravis acknowledged that the DVD market was "fueled by the addition of new material," rather than the re-release of old adult films. RT 6/23/04 106:19-107:3. The value of DVD rights in two, otherwise economically comparable, films therefore differs if one film was produced ten years prior to the advent of DVDs, and the

second film was produced one year before the widespread use of DVDs. Distributors began to market adult films by DVD in approximately 1998. *See* RT 6/23/04 111:24-112:5. The Spice Films for which Kravis licensed DVD rights were produced from 1994 to 1997, in the years immediately preceding the widespread use of DVDs in the adult film market. *See* RT 6/23/04 113:15-18, RT 6/24/04 10:14-16. By contrast, the firs of the LTE Features were produced prior to 1988. RT 6/22/04 54:1-8. Accordingly, the value of DVD rights to the Spice Films and the LTE Features are not economically comparable. As such, the Court concludes that CVI has failed to quantify its lost profits as to its DVD rights in the LTE Features with the substantial certainty needed to sustain an award of damages.

(ii) Broadcast Rights

CVI asserts that Kravis estimated the value of broadcast rights in the Features at $2,500 per Feature, encompassing satellite television rights, pay-per-view rights, and free television rights. CVI's Brief at 18. LTE responds that CVI has made no showing that the presence of a compilation containing scenes from any Feature would deter a cable station from broadcasting the Feature. LTE's Brief at 11. In addition, LTE asserts that Dani Duran Niekerk testified that no cable market existed in Europe between 1988 and 1993, and therefore the Features could not have been broadcast over cable in Europe until years after they were produced, reducing the value of CVI's broadcast rights to the LTE Features. *See* LTE's Brief at 10, citing RT 6/24/04 61:3-22.

CVI claims that it would have earned $630,000 in broadcast rights ($2,500 per Feature), absent the presence of the compilations in the market. CVI's expert reached this estimate based in part upon a March 27, 1995 licensing

agreement between Coastline Films, Inc. and Mercator Filmverleigh GmbH ("Mercator"), licensing all rights as to some films, and all rights except for broadcast rights as to other films. RT 6/23/04 74:9-75:7, Ex. CVI-3039. Kravis asserted that the films licensed without broadcast rights are Spice Films, and the other films "are just films I represented at the time from outside producers. . ." RT 6/23/04 74:23-75:6. Accordingly, Kravis determined the value of the broadcasting rights by taking the difference between the films licensed without broadcast rights, and the films licensed with broadcasting rights. *See* also RT 6/23/04 76:14-77:25, Ex. CVI-3040 (similar licensing agreement dated August 20, 1995).

The Court concludes that Kravis has not established that the broadcast rights to the Spice Films are economically comparable to the broadcast rights to the LTE Features.[10] In particular, when Kravis produced the Spice Films he specifically contemplated that the Spice Films would be broadcast on the Spice channel. *See* 6/23/04 RT 113:6-114:3. The Spice Films were produced from 1994 to 1997, years after the production of the LTE Features, and following the significant expansion of the cable market in Europe. 6/23/04 RT 113:15-18, RT 6/24/04 10:14-16.

By contrast, CVI acquired the LTE Features in order to sublicense home video rights to the Features. 6/22/04 RT 56:15-24. Dani Duran Niekerk testified that from 1988 to 1992, CVI customarily sold home video rights, because "[t]hose were the rights that were available in those days." RT 6/22/2004 57:9-25. It is true that LTE could have sold broadcast rights in the LTE Features after

[10] In addition, the Court notes the Kravis has not even attempted to establish that broadcast rights to the non-Spice Films licensed to Mercator are comparable to the broadcast rights to the LTE Features.

the broadcast market expanded. However, Dani Duran Niekerk conceded that the adult entertainment market was generally "driven by new material." *See* RT 6/24/03 61:17-62:9. Therefore, the broadcast rights to the Spice Films, produced from 1994 to 1997, and the broadcast rights to the LTE Features, produced from 1988-1993, are not economically comparable.

For purposes of his comparison, Kravis also relies on other licensing agreements entered into on October 24, 1991 (*see* Ex. CVI-3026, licensing sixteen films for pay-per-view satellite TV and pay-per-view ground TV in Scandinavia at a rate of $1000 per film), October 5, 1993 (*see* Ex. CVI-3025, licensing cable, satellite and free TV rights in Israel at a rate of $400 per film), July 5, 2000 (Ex. CVI-3035, licensing worldwide pay TV rights at $2,500 per film), and April 7, 1994 (Ex. CVI-3023, licensing ground and satellite pay-per-view and cable rights to twenty films in Italy at $2,500 per film).[11] The Court finds that the licensing agreements proffered by Kravis encompass different subsets of broadcasting rights, in a patchwork of different limited territories. *See, e.g.*, Exs. CVI-3023, CVI-3025, CVI-3026, CVI-3055. In addition, the dates on which these agreements were entered into span almost a decade. Therefore, it appears that Kravis failed to employ a rational methodology to

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[11] Kravis stated that the films licensed in Italy were not necessarily Kravis Films or Spice Films. RT 6/23/04 46:17-47:9. Instead Kravis recalls that "I picked . . . titles that I believe I own." *Id.* Kravis stated that "I believe there's only a few of these that are included in the Kravis library" and that "[m]ost of the others [are] owned by Coast Line Films and . . . would have been part of the Kravis library" aside from the fact that they were shot on film instead of video. *Id.* Likewise as to the Films licensed in Israel, Kravis notes that some of the titles were Kravis Films, and others were not because they were shot on film. RT 6/23/04 51:24-52:5.

support his opinion that the value of all broadcast rights in the LTE Features, in all territories worldwide excluding the United States and Canada, equal $2,500 per Feature.

Accordingly, the Court concludes that CVI has failed to establish that the presence of the LTE compilations in the foreign market has reduced the value of CVI's cable rights in the Features with the degree of certainty necessary to award damages.

(iii) Miscellaneous Rights

Finally, Kravis estimates the value of "miscellaneous rights" in the Features, including theatrical rights, hotel/motel licensing rights, mail order rights, CD-ROM rights, and Internet rights, at $500 per film. CVI's Brief at 19-20. LTE responds that the uncontested facts show that markets for licensing adult films on CD-ROM or over the Internet were non-existent at the time the LTE Features were being produced and licensed. LTE's Brief at 6. In addition, LTE asserts that CVI is not entitled to damages as to theatrical rights or hotel/motel licensing rights.

The Court concludes that any damages as to CVI's miscellaneous rights in the Features are speculative. Kravis testified that no market existed for the distribution of adult films over the Internet or by CD-ROM between 1989 and 1993 when the Features were produced. RT 6/23/04 111:5-20. In addition, Kravis conceded that the market for theatrical licensing was "a limited market." RT 6/23/04 113:3-5. Accordingly, the Court concludes that the April 24, 1998 Agreement to license theatrical rights within Israel at a price of $400 per film for a subset of the Kravis Films, does not support a damage award based on CVI's theatrical rights in the Features. *See* Ex.

CVI-3045. Likewise, CVI has not introduced sufficient evidence into the record to support an award of damages based upon CVI's mail order rights or hotel/ motel licensing rights in the Features.

C. Compilation Rights

CVI contends that LTE's distribution of illegal compilations destroyed the value of CVI's compilation rights in the LTE Features. Kravis estimates that, absent LTE's distribution of compilations, the compilation rights to the Features would have been valued at $5,000 per film. RT 6/23/04 69:6-13. In addition CVI contends that LTE's profit of $2,800,000 from the sale of the illegal compilations in Europe provides a proxy for CVI's lost profits as to the compilation rights in the LTE Features. CVI's Brief at 17.

However, while Kravis testified that LTE's illegal distribution of compilations destroyed the value of the LTE Features, Kravis did not testify that LTE's illegal distribution of compilations would destroy the value of compilation rights in Features. Instead, Kravis stated that it was customary in the adult film industry to sell exclusive compilation rights, such that different sets of compilations could compete in the same market. *See* RT 6/23/04 136:25-137:24. In addition Kravis conceded that rights to compilations were customarily marketed worldwide, rather than to a specific territory.[12] *See* RT 6/23/04 136:15-24. By the terms of the Purchase Agreements; CVI

[12] Kravis also conceded that LTE had greater experience marketing compilation rights than did CVI, stating that LTE "was really the first mass marketer of compilations into the European territory." RT 6/23/04 18:13-15. Kravis opined that LTE's approach to marketing compilations "was actually new" in that "it put more emphasis on that marketplace." RT 6/23/04 17:19-18:7.

was barred from licensing any of the scenes from the LTE Features in the United States, such that CVI could not have marketed the compilation rights to the LTE Features worldwide.

Therefore, the Court concludes that CVI's lost profits as to compilation rights in the LTE Features cannot be calculated with substantial certainty, and that Kravis' estimate of lost profits is speculative.

D. Prejudgment Interest

CVI seeks an award of prejudgment interest pursuant to Cal. Civ. Code § 3287(b). CVI argues that an award of prejudgment interest is fair and equitable on the ground that the Court has previously determined that LTE's actions were willful. *See* CVI's Application for Prejudgment Interest at 1. CVI further argues that LTE has retained profits in the amount of $2,800,000 from its breach of the Purchase Agreements fourteen years ago. *Id.* at 2, 6. Accordingly, CVI contends that equity and fairness militate in favor of an award of prejudgment interest from the date that CVI filed its breach of contract claim. *Id.* at 4-5, citing *A & M Produce v. FMC Corp.*, 135 Cal. App. 3d 473 (1982).

Cal. Civ. Code § 3287(b) provides that:

> Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment, as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

The California Court of Appeal has stated that Cal. Civ. Code § 3287(b) "created a limited exception to the prevailing general rule that prejudgment interest is not allowed on unliquidated obligations." *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.*, 90 Cal. App. 4th 64, 69 (2001). "The usual prohibition against such interest is based on the rationale that is unreasonable to expect a defendant to pay a debt before he or she becomes aware of it or is able to compute its amount." *Id.* However, the California Court of Appeal explained that "[b]y allowing an award of prejudgment interest, but only for a limited time period and only if the trial court finds it reasonable in light of the circumstances of a particular case, [Cal. Civ. Code § 2387(b)] seeks to balance the concern for fairness to the debtor against the concern for full compensation to the wronged party." *Id.*, citing *Wisper Corp., v. California Commerce Bank*, 49 Cal. App. 4th 948, 960 (1996). *See also A&M Produce Co. v. FMC Corporation*, 135 Cal. App. 3d 473, 496 (1982) (concluding that even though the exact amount of plaintiff's damages had been disputed, an award of prejudgment interest pursuant to Cal. Civ. Code § 3287(b) was appropriate).

In this action, the Ninth Circuit affirmed the Court's April 24, 1997 findings as to CVI's breach of contract claim on July 2, 1999, remanding only for "a determination of contract damages." *See Leisure Time Entertainment, Inc. v. Cal Vista*, 1999 U.S. App. LEXIS 15098 (9th Cir. 1999). Accordingly, the Court awards CVI prejudgment interest on $1,482,226 from July 2, 1999 to the present.

E. Attorneys' Fees

The Purchase Agreements pursuant to which CVI licensed the LTE Features provide that:

> Should any litigation be commenced between the parties to this contract, arising out of this Agreement, the party prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and [sic] for his attorney's fees in such litigation.

LTE's Exs. 1-39. The Court finds that CVI is the prevailing party in this action, and as such is entitled to recover costs and attorneys' fees incurred in this action.

IV. CONCLUSION

For the reasons set forth above, the Court awards defendant and counterclaimant Cal Vista International, Ltd., damages in the amount of $1,482,226. The Court awards CVI prejudgment interest from July 2, 1999, pursuant to Cal. Civ. Code § 3287(b). The Court further finds that CVI is the prevailing party in this action, and as such is entitled to recover costs and attorneys' fees incurred.

IT IS SO ORDERED.

Dated: August 23, 2004

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
CLERK, U.S. DISTRICT COURT
AUG 25 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
AUG 25 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

Priority	✓
Send	✓
Enter	✓
Closed	
JS-5/JS-6	✓
JS-2/JS-3	
Scan Only	

LEISURE TIME ENTERTAINMENT, INC., an Indiana corporation; and GLOBAL VIDEOS, INC., dba TRANS GLOBAL FILMS, an Indiana corporation,

Plaintiffs,

vs.

CAL VISTA, SIDNEY NIEKERK, LLOYD ROBINSON, and DOES 1 through 50,

Defendants.

Case No. CV 94-02873 CAS (VBKx)

JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

WHEREAS, the issue of damages was tried to the Court on June 22, 2004, June 23, 2004, and June 24, 2004;

AND WHEREAS, on August 23, 2004, the Court issued its Findings of Fact and Conclusions of Law;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment is granted as follows:

For the reasons set forth in its Findings of Fact and Conclusions of Law, the Court awards judgment in favor of defendant and counterclaimant Cal Vista International, Ltd. ("CVI"), and against plaintiffs and counterdefendants, in the amount of $1,482,226, plus prejudgment interest from July 2, 1999. The Court further finds that CVI is the prevailing party and is entitled to recover its costs and attorneys' fees.

IT IS SO ORDERED.

Dated: August 23, 2003

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEISURE TIME ENTERTAINMENT, INC., an Indiana corporation and GLOBAL VIDEOS, INC., dba TRANS GLOBAL FILMS, an Indiana corporation, Plaintiffs, vs. CAL VISTA INTERNATIONAL, LTD., SIDNEY NIEKERK and DOES 1 through 50, inclusive, Defendants.	Case No. CV-94-2873 CAS (VBKx) [The Honorable Christina A. Snyder] STIPULATION TO AMEND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ENTERED ON AUGUST 25, 2004 BASED THEREON; AND TO EXTEND TIME TO FILE MOTION FOR ATTORNEYS' FEES AND APPLICATION FOR COSTS AND TIME TO RESPOND THERETO; [PROPOSED] ORDER THEREON
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	

The parties, Defendant and Counterclaimant Cal Vista International, Ltd. ("CVI") and Plaintiff and Counter-Defendant Leisure Time Entertainment, Inc. ("LTE"), by and through their counsel of record, hereby enter into this stipulation based on the following facts:

On August 25, 2004, this Court entered its Findings of Fact and Conclusions of Law ("Findings"), and Judgment against LTE and in favor of CVI. The Court awarded CVI damages in the amount of $1,482,226 on account of LTE's breaches of 39 Purchase Agreements pursuant to

which CVI acquired exclusive foreign rights to 257 adult feature films. The Court's calculation of damages was based, in part, on a finding set forth on page 8 of the Findings that LTE had sold 67 features to CVI in the year 1988, 49 features in the year 1989 and 29 features in the first half of 1990 for a total of 145 features. As evidence for that finding, the Court relied on Plaintiff's Exhibits 1-24 filed by LTE on July 11, 2000, and admitted during trial on July 13, 2000. Upon receiving the Court's Findings, CVI's counsel reviewed Plaintiff's Exhibits 1-24 and advised counsel for Plaintiff of errors in those exhibits. As soon as the errors were pointed out to LTE's counsel, he immediately examined the exhibits and agreed to enter into this Stipulation correcting the record to reflect that 51 Features, not 67 Features, were purchased in 1988.

When Plaintiff's counsel, Herald Price Fahringer, first entered this case he inherited the files from previous counsel, who had assembled the Purchase Agreements in chronological order. New counsel maintained the Agreements in that sequence and they were received in evidence, as Plaintiff's Exhibits 1-39, in the second and third trials in that manner. Plaintiff's counsel was unaware that Plaintiff's Exhibit 1, which was a contract entered into in 1988, pursuant to which CVI purchased four films for the territory of the entire world in perpetuity, was not among the 39 Purchase Agreements which were the subject of this lawsuit, nor were the films purchased thereby among the 257 Feature Films which were the subject of this lawsuit.

Plaintiff's Exhibit 2 was a contract which related to 21 films. The year of the Purchase Agreement in Exhibit 2 was obliterated from Plaintiff's copy of the Agreement. However, because of its place in the pre-arranged Purchase

Agreements obtained from prior counsel, Plaintiff's new counsel honestly believed that the date of the Purchase Agreement was March 2, 1988, rather than March 2, 1992. That same exhibit was also introduced, in proper chronological order, as Plaintiff's Exhibit 32 in the 2000 Trial. Thus, this contract was inadvertently included in Plaintiff's exhibits twice. Copies of Plaintiff's Exhibit 1 and Exhibit 2 are attached herewith for the Court's convenience as Exhibits A and B; also attached as Exhibit C is Plaintiff's Exhibit 32 which is a duplicate of Plaintiff's Exhibit 2 and bears the date March 2, 1992.

Plaintiff's exhibits from the 2000 Trial also inadvertently omitted a contract entered into between LTE and CVI dated February 24, 1988 relating to eight Features which had been first identified as Exhibit 42 on the Joint Exhibit List filed on February 5, 1997. The contract was introduced into evidence during the 1997 Trial on January 30, 1997. Inasmuch as that Joint Exhibit List is over 100 pages long, we have attached herewith, as Exhibit D, the front page of the Joint Exhibit List showing the clerk's filing stamp and pages 1 through 3 thereof. Exhibit 42, which is the contract here in question, is noted on Page 3 of the Joint Exhibit List. A copy of the contract itself is attached hereto as Exhibit E.

Accordingly, the films actually contracted for by CVI amounted to 51 films during the year 1988; 49 films during the year 1989; and 29 films prior to November 1990, for a total of 129. The Court's calculation of damages awards the sum of $18,096 in damage for each of the Features acquired after LTE began to distribute compilations into the Foreign Territory (i.e. mid-1990). By virtue of the inadvertent and unintentional understatement of that number by 16, the damage award should be increased by $289,536 (16 x $18,096). To complete the Court's

calculation (see: Finding on p. 13) it is necessary to reallocate the revenues actually received by CVI to the 16 Features. Accordingly, the sum of $4,243.42 x 16 = $67,894.72 should be deducted from the damage award to reallocate revenues actually received by CVI.

Therefore, CVI's damage award should be increased by $289,536.00 (additional damage) less $67,895.00 (additional revenue received) for a total of $221,641.00.

Both counsel have agreed that the time within which CVI may file any and all application or other documents relating to its costs and/or attorneys' fees may be extended through September 23, 2004. The parties have also agreed that the time within which LTE may file the response to CVI's requests for costs and/or attorneys' fees is similarly extended for a period of two weeks from its otherwise due date,

IT IS HEREBY STIPULATED AND AGREED, as follows:

1. That the Findings of the Court entered on August 25, 2004, be amended to provide that the total number of LTE Features contracted for during the year 1988 was 51 and not 67;

2. That the damage calculation set forth in said Findings on pp. 8 and 9 be revised to account for the preceding amendment;

3. That the damage award to CVI be increased by the sum of $221,641.00;

4. That nothing contained in this Stipulation shall be deemed to be an agreement or ratification by LTE of the Court's Findings of Fact and Conclusions of Law and nothing stated in this stipulation is to be deemed, in any

way, a waiver of LTE's claim that CVI is not entitled to any damages for all the reasons previously submitted to this Court; and

5. That the Court sign, file and enter a revised Judgment in the form attached hereto as Exhibit F.

IT IS FURTHER STIPULATED that CVI shall have until Thursday, September 23, 2004, to file and serve any and all documents, motions, application or exhibits thereto relating to its recovery of any and all costs and/or attorneys' fees in connection with this action and that LTE shall have an additional two weeks within which to respond to any such documents, motions and applications.

Dated: September 9, 2004

By: /s/ Michael M. Plotkin
MICHAEL M. PLOTKIN

Attorneys for Defendants CAL VISTA INTERNATIONAL, LTD. and SIDNEY NIEKERK and Counter-Claimant CAL VISTA INTERNATIONAL, LTD.

Dated September 9, 2004

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA, LLP

By: /s/ Herald Price Fahringer by Erica T. Dubno
HERALD PRICE FAHRINGER
ERICA T. DUBNO

Attorneys for Plaintiff and Counter-Defendant LEISURE TIME ENTERTAINMENT, INC., Plaintiff GLOBAL VIDEOS, INC. and Cross-Defendant MARK CARRIERE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LEISURE TIME ENTERTAINMENT, INC., an Indiana corporation and GLOBAL VIDEOS, INC., dba TRANS GLOBAL FILMS, an Indiana corporation, Plaintiffs, vs. CAL VISTA INTERNATIONAL, LTD., SIDNEY NIEKERK and DOES 1 through 50, inclusive, Defendants. AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	Case No. CV-94-2873 CAS (VBKx) **AMENDED JUDGMENT**

WHEREAS, the issue of damages was tried to the Court on June 22, 2004, June 23, 2004, and June 24, 2004;

AND WHEREAS, on August 23, 2004, the Court issued its Findings of Fact and Conclusions of Law;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment is granted as follows:

For the reasons set forth in its Findings of Fact and Conclusions of Law, the Court awards judgment in favor of defendant and counterclaimant Cal Vista International, Ltd. ("CVI"), and against plaintiffs and counterdefendants, in the amount of $1,703,867.00, plus prejudgment interest from July 2, 1999. The Court further finds that CVI is the prevailing party and is entitled to recover its costs and attorneys' fees.

IT IS SO ORDERED.

Dated: September 10, 2004

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 22 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GLOBAL VIDEOS, INC., d/b/a Trans Global Films, an Indiana Corporation,

Plaintiff - Appellant,

LEISURE TIME ENTERTAINMENT, INC., an Indiana Corporation, a/k/a Seal 1,

Plaintiff-counter-defendant - Appellant,

V.

SIDNEY NIEKERK, a/k/a Seal B; LLOYD ROBINSON, a/k/a Frank W. Jose, MD,

Defendants - Appellees,

CAL VISTA INTERNATIONAL, LTD.,

Defendant-counter-claimant-cross-claimant - Appellee,

And

MARK CARRIERE, an individual,

No. 04-56690

D.C. No. CV-94-02873-CAS

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California,
Christina A. Snyder, District Judge, Presiding

Argued and Submitted June 9, 2006
Pasadena California

Before: REINHARDT, TROTT, and WARDLAW, Circuit Judges.

Leisure Time Entertainment, Inc. ("Leisure Time") appeals the district court's award of damages for lost profits, attorney's fees, and prejudgment interest to Cal Vista International, Ltd. ("Cal Vista"). We affirm.

The district court did not clearly err in finding that Leisure Time's illegal distribution of compilations proximately caused Cal Vista to lose profits. There is testimony in the record that Cal Vista's licensing of the Leisure Time features decreased after the compilations were distributed, that Cal Vista received complaints from its licensees that Leisure Time's compilations were inhibiting their sales, and that Cal Vista lost several customers following Leisure Time's distribution of the compilations. While the question of causation was a close call, "[t]he district court's determination here is plausible in light of the record before the district court . . . and will not be disturbed on appeal." *Husain v. Olympic Airways*, 316 F.3d 829, 839 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004).

Substantial evidence supports the district court's method of computing Cal Vista's lost profits. *See Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001). The district court's comparison of the revenue garnered by similar adult films, in order to determine how much money Cal Vista's films would have produced absent

the compilations, was a "reasonable basis of computation." *Acree v. Gen. Motors Acceptance Corp.*, 92 Cal.App.4th 385, 398 (Cal.Ct.App. 2001). An award for lost profits is inherently an estimate, *Humetrix, Inc.*, 268 F.3d at 919, and the use of other films to approximate Cal Vista's lost profits was an acceptable means by which to measure Cal Vista's damages.

The district court's finding that the Kravis films were economically comparable to Cal Vista's films was not clearly erroneous. David Kravis, Cal Vista's expert witness, testified that while the Kravis films had higher production costs, Cal Vista's films featured more prominent stars. He testified also that the two libraries of films were comparable in terms of their scene structure and formula. The evidence is more than sufficient to support the district court's finding of economic comparability.

The district court did not abuse its discretion in awarding attorney's fees to Cal Vista pursuant to California Civil Code section 1717(a). The court discounted work that was not sufficiently related to Cal Vista's successful claim and explained why Cal Vista's attorneys' rates were reasonable. The fact that Cal Vista was unsuccessful in Leisure Time's prior appeals does not render abusive the district court's exercise of discretion. Nothing in the district court's award of fees "shocks the conscience" or "suggests that passion and prejudice influenced the determination." *Akins v. Enter. Rent-A-Car Co. of San Francisco*, 79 Cal.App.4th 1127, 1134 (Cal.Ct.App. 2000).

The district court did not abuse its discretion in awarding Cal Vista prejudgment interest, pursuant to California Civil Code section 3287(b), to run from the date on which we affirmed the determination that Leisure Time breached its contracts with Cal Vista. Leisure Time initially filed this lawsuit in 1994, the case has gone through four appeals,

and Leisure Time's breaches of contract were willful. Therefore, the award of prejudgment interest was an appropriate exercise of discretion. *See A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 496 (Cal.Ct.App. 1982) (award of prejudgment interest upheld, in part because the case had gone on for over seven years and had required three trials).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 10 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GLOBAL VIDEOS, INC., d/b/a Trans Global Films, an Indiana Corporation,

Plaintiff - Appellant,

LEISURE TIME ENTERTAINMENT, INC., an Indiana Corporation, a/k/a Seal 1,

Plaintiff-counter-defendant - Appellant,

V.

SIDNEY NIEKERK, a/k/a Seal B; LLOYD ROBINSON, a/k/a Frank W. Jose, MD,

Defendants - Appellees,

CAL VISTA INTERNATIONAL, LTD.,

Defendant-counter-claimant-cross-claimant - Appellee,

And

MARK CARRIERE, an individual,

No. 04-56690

D.C. No. CV-94-02873-CAS

Central District of California, Los Angeles

ORDER

Before: REINHARDT, TROTT, and WARDLAW, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Reinhardt and Wardlaw have voted to deny the petition for rehearing en banc and Judge Trott so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

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Central District of California, Los Angeles

ORDER

Before: REINHARDT, TROTT, and WARDLAW, Circuit Judges.

The motion to stay the mandate pending the filing and determination of a petition for a Writ of Certiorari to the United States Supreme Court is hereby GRANTED.